RECORD AND BRIEFS

16-258

Supreme Court, U.S.
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No. 16-

IN THE

Supreme Court of the United States

DIGNITY HEALTH, ET AL.,

Petitioners,

v.

STARLA ROLLINS,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

BARRY S. LANDSBERG
HARVEY L. ROCHMAN
JOANNA S. MCCALLUM
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4000

LISA S. BLATT
Counsel of Record
ELISABETH S. THEODORE
ARNOLD & PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA") governs employers that offer pensions and other benefits to their employees. "Church plans" are exempt from ERISA's coverage. 29 U.S.C. §§ 1002(33), 1003(b)(2). For over thirty years, the three federal agencies that administer and enforce ERISA—the Internal Revenue Service, the Department of Labor, and the Pension Benefit Guaranty Corporation—have interpreted the church plan exemption to include pension plans maintained by otherwise qualifying organizations that are associated with or controlled by a church, whether or not a church itself established the plan.

The question presented is whether the church plan exemption applies so long as a pension plan is maintained by an otherwise qualifying church-affiliated organization, or whether the exemption applies only if, in addition, a church initially established the plan.

PARTIES TO THE PROCEEDING

Petitioners Dignity Health and Herbert J. Vallier were the defendants in the district court and the appellants in the Ninth Circuit.

Respondent Starla Rollins was the plaintiff in the district court and the appellee in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

Dignity Health has no parent, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The Ninth Circuit's opinion (App. 1a) is not yet reported and is available at 2016 WL 3997259. The district court's opinions (App. 26a and App. 43a) are reported at 59 F. Supp. 3d 965 and 19 F. Supp. 3d 909.

JURISDICTION

The Ninth Circuit issued its decision on July 26, 2016 (App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The statutory and constitutional provisions involved include § 3(33) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(33); § 414(e) of the Internal Revenue Code, 26 U.S.C. § 414(e); and the First Amendment, U.S. Const. amend. I. These provisions are set forth in appendix E.

STATEMENT

It has been settled law for well over thirty years that pension plans maintained by otherwise qualifying church-affiliated organizations are exempt from ERISA, 29 U.S.C. § 1001 et seq., whether or not a church itself established the plan. The three federal agencies charged with interpreting ERISA—the Internal Revenue Service (IRS), Department of Labor (DOL), and Pension Benefit Guaranty Corporation (PBGC)—agree that such plans qualify for ERISA's "church plan" exemption, and since 1983 have issued opinion after opinion reaffirming that view. Countless nonprofit religious hospitals, orphanages, schools, day-care centers, and old-age homes have structured their pension plans in reliance on these

agencies' views and on the until-now-unanimous lower court decisions confirming their exempt status.

In the decision below, the Ninth Circuit joined two other federal appellate courts that have recently upset this longstanding and settled view. Agreeing with the Third and Seventh Circuits, the Ninth Circuit held that ERISA's church plan exemption applies only if a church "established" the plan. The religious organizations involved in the Third and Seventh Circuit cases have filed petitions for certiorari. *See Advocate Health Care Network v. Stapleton*, Pet. for Certiorari, No. 16-74 (July 15, 2016); *Saint Peter's Healthcare System v. Kaplan*, Pet. for Certiorari, No. 16-86 (July 18, 2016). As those petitions explain, the question presented manifestly warrants this Court's review. And as the five amici supporting certiorari in *Advocate* and *Saint Peter's* highlight, the impact of these decisions could be catastrophic and irreversible, both as a practical matter and financially, for religious organizations across the nation. The decisions upend the substantial reliance interests of countless organizations like Dignity Health, which received four confirmations from the IRS and a fifth from the PBGC that its pension plan qualified as a church plan. And the decisions encourage and require governmental interference in religious affairs, contrary to the Constitution and to Congress's express goal in creating the church plan exemption.

This Court should step in now and resolve this threshold issue of ERISA coverage, which affects millions of employees across the nation. The Ninth Circuit's recent ruling only highlights that time is of the essence. Every day the Court waits, more and more religious organizations will be forced to convert their

pension plans to ERISA plans because of binding appellate decisions that conflict with three decades of agency precedent. The affected regions now include the entire West Coast. The Court should accordingly grant this petition and consolidate it with *Advocate* or *Saint Peter's* (assuming the Court grants review in those cases), or at a minimum hold the petition pending its decision in those cases.

A. Statutory Background

1. Congress has exempted "church plans" from the requirements of ERISA since it enacted the statute in 1974. 29 U.S.C. § 1003(b)(2) (1974). As originally enacted, ERISA defined an exempt "church plan" as "(i) a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954, or (ii) a plan described in subparagraph (C)." 29 U.S.C. § 1002(33)(A) (1976).[1] Subparagraph (C) in turn contained a temporary transitional provision regarding existing plans established and maintained for the employees of "one or more agencies of [a] church." *Id.* § 1002(33)(C). Such plans were "treated as a 'church plan,'" but only plans "in existence on January 1, 1974," and even for those plans, only through 1982. *Id.* Parallel, identical provisions of the Internal Revenue Code define the term "church plan" for tax and PBGC insurance purposes. 26 U.S.C. § 414(e) (1976); 29 U.S.C. § 1321(b)(3).

2. In 1977, the IRS determined that the church plan exemption did not cover pension plans estab-

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[1] Hereinafter, the term "church" includes a convention or association of churches.

lished and maintained by two orders of Catholic sisters for the employees of their hospitals. IRS Gen. Couns. Mem. 37,266, 1977 WL 46200 (Sept. 22, 1977). The IRS reasoned that a religious order is not a "church" unless the order is "carrying out the *religious* functions of the church," which the IRS limited to the "ministration of sacerdotal functions and the conduct of religious worship." *Id.* at *4-5 (quotation marks omitted). The IRS concluded that the sisters' services to the sick "are not 'church functions' ... since they are not religious." *Id.* at *5.

In response, religious groups of all denominations objected to the "intrusion of the [IRS] into the affairs of church groups and their agencies by presuming to define what is and what is not an integral part of these religious groups' mission." 125 Cong. Rec. 10,054-57. The groups explained that the IRS's view would require churches to expel from their pension plans the employees of affiliated organizations. *Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits*, 96th Cong. 384 (1979). The groups also warned that the IRS interpretation could prohibit a church from establishing and maintaining an exempt plan indirectly through an affiliated organization, such as a church "pension board." *Id.* at 387, 481.

3. In 1980, Congress amended the church plan exemption, making two principal changes. Multiemployer Pension Plan Amendments Act ("MPPAA"), Pub. L. 96-364, § 407. First, Congress made the church the employer of employees of church-affiliated organizations. Section 1002(33)(C)(ii) now defines the term "employee of a church" to "include[] ... an employee of an organization, whether a civil law corporation or otherwise, which is [a nonprofit]

and which is controlled by or associated with a church." *See also* 26 U.S.C. § 414(e)(3)(B) (parallel tax provision). A "church ... shall be deemed the employer of any individual included as an employee under clause (ii)." 29 U.S.C. § 1002(33)(C)(iii); *see* 26 U.S.C. § 414(e)(3)(C) (parallel tax provision).

Second, Congress added new § 1002(33)(C)(i), which states:

> A plan established and maintained for its employees (or their beneficiaries) by a church ... includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church ..., if such organization is controlled by or associated with a church ....

29 U.S.C. § 1002(33)(C)(i); *see* 26 U.S.C. § 414(e)(3)(A) (parallel tax provision). Thus, while the original Act defined a "church plan" as only those plans "established and maintained by a church," § 1002(33)(A), the Act now provides that a plan "established and maintained by a church ... includes a plan maintained by an organization [that] is controlled by or associated with a church," § 1002(33)(C)(i).

4. In 1983, the IRS concluded that, in light of the 1980 amendment, a plan maintained by a church-affiliated retirement committee is a church plan regardless of whether it was established by a church. IRS Gen. Couns. Mem. 39,007, 1983 WL 197946, at *1-2 (July 1, 1983). The IRS explained that a plan

covering employees of churches or church-affiliated organizations may qualify as a church plan in two ways. First, a church plan may "be established and maintained by a church." *Id.* at *5. The IRS reiterated its view that religious orders operating hospitals or the like are not "churches." *Id.* at *4. But under the amended exemption, "this nonchurch status is not fatal." *Id.* That is because, alternatively, a church plan may be "maintained ... by an organization described in" the tax-code equivalent of § 1002(33)(C)(i)—*i.e.*, by a church-controlled or associated organization. *Id.* at *5. "[B]ecause of the passage of the MPPA[A]," the IRS explained, "church plan status no longer hinges on whether an order is a church." *Id.* at *6.

Since then, the IRS has issued more than 500 private letter rulings ("PLRs") confirming that plans maintained by qualifying church-affiliated organizations—including specifically petitioner's plan—are exempt regardless of whether they were established by churches. Pet. App. 70a-111a (No. 16-74). The agency issued its most recent church plan ruling while this case was pending in the Ninth Circuit. *See* IRS PLR 2015-51004, 2015 WL 9245327 (Dec. 18, 2015).

The DOL likewise has issued nearly 70 advisory opinions determining that pension plans maintained by qualifying church-affiliated organizations are church plans regardless of whether they were established by churches. Pet. App. 64a-69a (No. 16-74). And the PBGC does not insure plans that are exempt because they are maintained by church-affiliated organizations, regardless of whether they were established by churches. *See* PBGC Op. Ltr. 78-1 (Jan. 5, 1978); PBGC, Questions to the PBGC and Summary

of Their Responses 25 (Mar. 2011), http://www.pbgc.gov/documents/2011bluebook.pdf.

5. Since 1983, Congress has passed three statutes that presume that church-affiliated organizations can establish an exempt church plan.[2] And Congress has never disturbed the consistent, longstanding, unanimous interpretation by the IRS, DOL, and PBGC, even though it has had ample opportunity to do so. Congress has amended ERISA's definition section a dozen times,[3] and has incorporated or referenced the same definition of "church plan" in more than a dozen provisions across the U.S. Code.[4]

B. Factual Background

1. Petitioner Dignity Health is a nonprofit corporation intimately associated with the Catholic

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[2] Pub. L. 97-248, § 251(b) (1982); Pub. L. 108-476, § 1 (2004); Pub. L. 112-142, § 2 (2012).

[3] Pub. L. 99-272, § 11016(c)(1) (1986); Pub. L. 99-509, § 9203(b)(1) (1986); Pub. L. 99-514, § 1879(u)(3) (1986); Pub. L. 100-202, § 136(a) (1987); Pub. L. 101-239, §§ 7871(b)(2), 7881(m)(2)(D), 7891(a)(1), 7893(a), 7894(a)(1)(A), (2)(A), (3), (4) (1989); Pub. L. 101-508, § 12002(b)(2)(C) (1990); Pub. L. 102-89, § 2 (1991); Pub. L. 104-290, § 308(b)(1) (1996); Pub. L. 105-72, § 1(a) (1997); Pub. L. 109-280, §§ 611(f), 905(a), 906(a)(2)(A), 1104(c), 1106(a) (2006); Pub. L. 110-28, § 6611(a)(1), (b)(1) (2007); Pub. L. 110-458, § 111(c) (2008).

[4] Pub. L. 99-272, § 10001(b)(2) (1986); Pub. L. 99-514, § 1151(k)(4) (1986); Pub. L. 100-647, § 3011(a) (1988); Pub. L. 104-188, §§ 1456, 1461, 1462 (1996); Pub. L. 104-191, §§ 102, 402(a) (1996); Pub. L. 104-290, § 508 (1996); Pub. L. 105-34, §§ 1522, 1532 (1997); Pub. L. 105-200, § 401(f) (1998); Pub. L. 106-244, § 2 (2000); Pub. L. 107-16, § 659(a)(1) (2001); Pub. L. 108-203, § 422 (2004); Pub. L. 108-359, § 1 (2004); Pub. L. 109-280, § 865 (2006); Pub. L. 114-113, § 336 (2015).

Church. Dignity Health was formed in 1986 through the combination of two hospitals sponsored by congregations of Catholic women religious—the Sisters of Mercy Congregations in Auburn and Burlingame, California. COA App. 309.[5] Additional orders of Catholic women religious have joined over the years, bringing new Catholic hospitals with them. And Dignity Health has also entered into partnerships with outside hospitals, including non-Catholic community hospitals. COA App. 64-65. Each partnership was approved by a Catholic bishop, and all non-Catholic community hospitals partnered with Dignity Health must commit to a Statement of Common Values that incorporates the vast majority of the moral rules set forth in the U.S. Conference of Catholic Bishops' Ethical and Religious Directives for Catholic Health Care. COA App. 65, 149.

Dignity Health is deeply Catholic both in organization and operation. The original Sponsoring Congregations and the congregations of Catholic women whose hospitals joined Dignity Health hold guaranteed seats on Dignity Health's board of directors and the board's executive committee. COA App. 172, 180. The Sponsoring Congregations can veto any change to the religious directives applicable to Dignity Health's Catholic hospitals, and to the Statement of Common Values applicable to all Dignity Health hospitals. A Mission Integrity Committee—which includes Sponsoring Congregation representatives—monitors Dignity Health's adherence to its Catholic

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[5] Until 2012, Dignity Health was known as Catholic Healthcare West. Dignity Health renamed itself as part of a 2012 restructuring that was approved by the Archbishop of San Francisco. COA App. 158-64. For simplicity this petition refers to Dignity Health throughout.

mission. COA App. 184-85. A Catholic sister monitors Dignity Health's investments to ensure they comport with Catholic values. Crucifixes and pictures of the Pope and the Archbishop of San Francisco hang throughout Dignity Health's offices. COA App. 496. Meetings begin with a prayer or inspirational reflection. COA App. 221. Dignity Health's "[m]ission" is to "further[] the healing ministry of Jesus." Dignity Health, *Mission, Vision, and Values*, https://goo.gl/BczVWl.

Dignity Health sponsors a generous defined benefit pension plan (the "Plan"), overseen by a committee controlled by the Sponsoring Congregations. The Plan covers employees of Dignity Health and its hospitals, as well as women religious who work in those hospitals as part of their religious vocation. These employees contribute nothing to their pensions—a benefit that is unusual in the private hospital industry, where only 16 percent of employees have access to a defined benefit pension plan at all.[6]

The Plan has qualified as an exempt church plan since it was formed in 1989, and has operated as a church plan since 1992. The IRS confirmed four separate times that the Plan and related plans are ERISA-exempt church plans. In 1993, Dignity Health received a private letter ruling from the IRS confirming that the Plan was a church plan since its formation. COA App. 430-36. Over the next five years, as Dignity Health grew, the IRS issued three additional PLRs confirming that the Plan and other

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[6] Bureau of Labor Statistics, Employee Benefits Survey, Retirement Benefits: Access, Participation, and Take-Up Rates Tbl. 2 (2015), http://www.bls.gov/ncs/ebs/benefits/2015/ownership/private/table02a.htm.

plans maintained for Dignity Health employees were church plans. COA App. 461-83.[7] And in 1995, the PBGC agreed that the Plan was an exempt church plan and refunded insurance premiums that Dignity Health had previously paid while awaiting confirmation of its church plan status. COA App. 438-48.

C. Proceedings Below

1. In 2013, despite 30 years of administrative and judicial decisions confirming that church plans need not be established by churches, an alliance of two plaintiff firms began bringing putative class actions against nonprofit religious employers across the nation, contending that their pension plans were not church plans because they were not established by churches. As the firms themselves recently observed, these lawyers "have for years together developed and litigated the *innovative* theory of liability at issue here." Mot. To Consolidate Actions and To Be Appointed Interim Lead Plaintiff and Interim Co-Lead Counsel at 1, *Garbaccio v. St. Joseph's Hosp. et al.*, No. 16-cv-2740 (D.N.J. May 27, 2016) (emphasis added).

On April 1, 2013, represented by the same two law firms, respondent filed this putative class action against Dignity Health, one of its officers, and unnamed members of its retirement committee (collectively Dignity Health). Respondent sought a declaration that Dignity Health's plan is not a church

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[7] Dignity Health sought a fifth ruling from the IRS in light of its restructuring in 2012, but the IRS has declined to act on that request while this litigation is pending. None of the issues decided by the district court or the Ninth Circuit, or presented for this Court's review, turns on anything that occurred in the 2012 restructuring.

plan, on the theory that it was not established by a church. Respondent further alleged that Dignity Health's plan was not maintained by an organization, "whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits." 29 U.S.C. § 1002(33)(C)(i). The IRS, DOL, and PBGC, however, have long agreed that a religious organization may satisfy the "principal purpose" requirement by creating a pension committee, as Dignity Health has done.

Respondent sought an injunction to bring the Plan in compliance with ERISA, damages, disgorgement, civil money penalties of up to $110 per class member per day for three separate claims, prejudgment interest, costs, and attorneys' fees and expenses. Respondent also alleged—as the plaintiffs in the present onslaught of church plan litigation do in every case—that Dignity Health's plan was underfunded, but in fact the plan is fully funded. App. 70a. Respondent did not allege that she or any other participant in the Plan has been denied any financial benefit to which they are entitled.

On December 12, 2013, the district court denied Dignity Health's motion to dismiss. The court concluded that a pension plan can only qualify for the church plan exemption if it was established by a church. App. 37a. The court acknowledged that "the position it takes here runs contrary to several cases outside this circuit that have considered the church plan exemption and have held that it applies to plans established by church-affiliated entities." App. 37a-38a. The court also opined, in a two-sentence analysis, that Dignity Health's pension committee could

not qualify as a "principal purpose" organization under the statute, and that the statute required Dignity Health itself to have the principal purpose of pension plan administration, rather than providing nonprofit healthcare. App. 35a-36a. The court did not explain how this conclusion was tenable in light of § 1002(33)(C)(i)'s express provision that a "principal purpose" organization need not be a "civil law corporation."

On July 22, 2014, the court granted respondent's motion for partial summary judgment on her declaratory relief claim, and denied Dignity Health's motion for partial summary judgment. App. 43a. The court rejected Dignity Health's argument that, even if the church plan exemption contains a church-establishment requirement, Dignity Health's plan was in fact established by congregations of Catholic women religious, who constitute the church. App. 51a-59a. The court also rejected Dignity Health's argument that respondent's claim was barred by the statute of limitations, concluding that *no* statute of limitations applied whatsoever. App. 49a-50a.

The court certified the case for interlocutory appeal, observing that "there are substantial grounds for disagreement" on the question whether a church plan must be established by a church, because "other courts have, in fact, disagreed." App. 66a. Over respondent's objection, the court stayed proceedings in the case. The court observed that respondent "has not shown that the Plan is currently at risk of being underfunded," and that, "to the contrary, [Dignity Health] ha[s] put forward evidence suggesting that the Plan is adequately funded for the next decade." App. 70a.

3. The Ninth Circuit affirmed, holding that church plans must be established by churches. The court stated that "[t]here are two possible readings" of § 1002(33)(C). App. 10a. But while § 1002(33)(C)(i)'s text provides that a "plan *established and maintained* ... by a church ... includes a plan *maintained* by [a qualifying church-affiliated] organization," the Ninth Circuit concluded that "the more natural reading ... is that the phrase preceded by the word 'includes' serves only to broaden the definition of organizations that may maintain a church plan." App. 10a. The Ninth Circuit did not conduct any textual analysis of the statute, instead relying exclusively on a hypothetical statute discussed in the separate Third Circuit decision, *Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175, 181 (3d Cir. 2015), that had likewise held that church plans must be established by churches. App. 10-11a.

The court asserted that the legislative history "is clear" that § 1002(3)(C)(i) "addressed only the problem of maintenance by church-controlled or church-affiliated pension boards." App. 14a. The bill's sponsor, however, had explained that § 1002(33)(C)(i) was intended to resolve doubts about plans that were "established ... by a pension board," rather than by a church. 125 Cong. Rec. 10,052 (1979). The Ninth Circuit declined to defer to the IRS's General Counsel Memorandum adopting Dignity Health's interpretation of the exemption, to the more than 550 IRS letter rulings and opinions letters from the Department of Labor, or to the PBGC's conclusion that plans like Dignity Health's are entitled to the exemption. App. 18a-20a.

Dignity Health had presented three other questions for interlocutory review—whether Dignity

Health's pension committee is a qualifying "principal purpose" organization, whether a church in fact established Dignity Health's plan, and whether the claims were time-barred. These questions were fully briefed, and the latter two questions could have ended the case in Dignity Health's favor regardless of whether there was a church-establishment requirement. Judge Fletcher acknowledged at oral argument that the district court's decision that Dignity Health's plan was established by Dignity Health alone, rather than jointly with the Sponsoring Congregations, was a "questionable decision" "given the documents I've got in front of me." Video of Oral Arg. 46:18-33.[8]

Nonetheless, as a matter of "discretion," App. 25a, the Ninth Circuit declined to reverse that "questionable decision" in the interlocutory appeal, even though it would have averted the need to even address the question presented. And the court likewise declined to address the district court's holding that no statute of limitations applied and that Dignity Health's pension committee did not qualify as an "organization, whether a civil law corporation or otherwise." The Ninth Circuit's decision to postpone these questions until after a final judgment means that (absent this Court's intervention) the parties will face many years of potentially unnecessary and burdensome litigation over issues like class certification and damages. And Dignity Health could be

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[8] Judge Fletcher referred to the documents "in front of me" because counsel for respondent, at oral argument, had advised the panel that Dignity Health had failed to turn over another relevant document in discovery. In a follow-up letter to the court, counsel for respondent acknowledged that he was mistaken and Dignity Health had produced the document.

forced to convert its plan into an ERISA plan only to have the Ninth Circuit later hold that a church had in fact established the plan.

A motion to stay the mandate pending the filing and disposition of this petition is now pending before the Ninth Circuit.

REASONS FOR GRANTING THE PETITION

I. The Question Presented Is of Enormous and Recurring Consequence

In the last three years, plaintiffs' firms have filed 36 class actions against religious hospital systems across the country, asserting in each case that only a church can establish a church plan.[9] As the petitions in *Advocate* and *Saint Peter's* explain, the lawsuits filed to date alone involve benefit plans affecting nearly a million people. Three federal appellate courts have issued decisions within the last year. A case before the Tenth Circuit—in which the district court rejected a church-establishment requirement—is pending. *Medina v. Catholic Health Initiatives*, No 16-1005 (10th Cir.). A case before the Sixth Circuit—which the district court also decided against the plaintiff—settled before oral argument. *Overall v. Ascension Health*, No. 14-1735 (6th Cir.). Additional class actions are currently pending in district courts within the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.

These suits seek billions of dollars in retroactive liability and a wholesale upheaval in the administration of pension plans affecting religious employers

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[9] The complaints are listed at Pet. for Certiorari 13 n.8 (No. 16-74).

and employees across the country. The consequences are likely irreversible. Some employers may be forced to eliminate their plans altogether and smaller organizations may collapse under the financial burden of retroactive liability, ERISA compliance, or both. Just one of these cases alone might warrant certiorari. But an explosion of litigation of this magnitude in such an important and recurring area of ERISA, where national uniformity is paramount, plainly warrants this Court's review.

A. The Third, Seventh, and Ninth Circuits Upset Three Decades of Administrative Practice

1. The Third, Seventh, and Ninth Circuits upended the consistent, longstanding position of all three federal agencies Congress charged with enforcing ERISA. In so doing, the courts upset the settled expectations of hundreds, probably thousands, of church-affiliated ministries, which provide benefits to millions of current and former employees across the country. Those religious employers, many for decades, have relied on the agencies' established, unanimous administrative interpretation when designing their benefits programs.

Since 1983, the IRS, DOL, and PBGC have consistently informed these employers that their pension and welfare plans are exempt from ERISA, regardless of whether a church established the plans. The IRS has issued more than 500 letter rulings to a vast array of religious employers large and small, including religious universities,[10] schools,[11] old-age

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[10] *E.g.*, IRS PLR 9443043, 1994 WL 589289 (Oct. 28, 1994).

[11] *E.g.*, IRS PLR 9547048, 1995 WL 693655 (Nov. 24, 1995).

homes,[12] youth programs,[13] "a charitable day care center, school, and nursery,"[14] "a regional mental health facility,"[15] homes for "poor, destitute and homeless children,"[16] and an organization serving "people who are developmentally disabled."[17] The DOL has issued nearly 70 advisory opinions to a similarly broad spectrum of religious ministries. Pet. App. 64a-69a (No. 16-74) (listing opinions issued to hospitals, schools, elder care organizations, theological seminaries, and nursing homes, among others). The PBGC has confirmed that these organizations need not pay insurance premiums. COA App. 438-48. These agencies have told religious employers that they may organize their pension programs around these administrative determinations. Rev. Proc. 2016-1, 2016-1 I.R.B. 1, § 11.01; ERISA Proc. 76-1, § 10.

Petitioner Dignity Health is a prime example. Between 1993 and 1998, Dignity Health received *four* separate letters from the IRS confirming that the Plan or related plans qualified for the exemption. COA App. 430-36; 461-83. In 1995, Dignity Health entered into a settlement agreement with the PBGC in which the PBGC agreed to *refund* insurance premiums that would be required if the Plan were an ERISA plan. COA App. 438-48. As part of that settlement agreement, the PBGC required Dignity

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[12] *E.g.*, IRS PLR 9332045, 1993 WL 305015 (Aug. 13, 1993).

[13] *E.g.*, IRS PLR 9621046, 1996 WL 275682 (May 24, 1996).

[14] IRS PLR 9034047, 1990 WL 700178 (Aug. 24, 1990),

[15] IRS PLR 9323031, 1993 WL 196373 (June 11, 1993).

[16] IRS PLR 9442033, 1994 WL 576806 (Oct. 21, 1994).

[17] IRS PLR 9632018, 1996 WL 448646 (Aug. 9, 1996).

Health to agree that it would never elect ERISA coverage (as church plans may voluntarily do). COA App. 443-44. A lower court decision holding that these administrative rulings stand for nothing is exactly the sort of decision that warrants this Court's review. Just this past Term, the Court highlighted the importance of respecting the "serious reliance interests" that result from agency interpretations of complicated statutory schemes. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

2. Countless other church-affiliated organizations have likewise reasonably relied on the agencies' settled interpretation. Before the current onslaught of litigation began in 2013, *every* court to consider the issue had held or assumed that church plans need not be established by churches. *E.g.*, *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547 (4th Cir. 2001); *Chronister v. Baptist Health*, 442 F.3d 648, 653-54 (8th Cir. 2006); *Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1127 (D. Minn. 2011); *Ward v. Unum Life Ins. Co. of Am.*, No. 09-cv-431, 2010 WL 4337821, at *2 (E.D. Wis. Oct. 25, 2010); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 84-85 (D. Me. 2004). As one commentator has explained, "[f]or about 30 years, everyone thought they knew what a church plan was." Susan Katz Hoffman, *When is a Church Not a Church?* Kaplan v. St. Peter's Healthcare System, 24 ERISA Litig. Rep., No. 1, Feb. 2016, at 3.

The vast majority of benefit plans currently operated as church plans were not established by churches themselves. Of the hundreds of church plans described in IRS letter rulings, DOL advisory opinions, and judicial opinions, only a handful were

established by a church. *See* IRS PLR 200326038, 2003 WL 21483121 (June 27, 2003); IRS PLR 9835028, 1998 WL 545377 (Aug. 28, 1998); IRS 8837061, 1988 WL 572737 (Sept. 16, 1988); IRS PLR 8447052, 1984 WL 268327 (Aug. 21, 1984).[18] Even plans established solely for clergy are often established not by the church itself but by pension boards. A pension plan for Baptist "ordained ministers," for example, "was established and maintained by the [Ministers and Missionaries Benefit Board]." *Coleman-Edwards v. Simpson*, No. 03-cv-3779, 2008 WL 820021, at *12 (E.D.N.Y. Mar. 25, 2008). Under the decision below, all of these plans, which may have been operating as church plans for decades, are suddenly not church plans. And more than 550 IRS and DOL rulings are not worth the paper they are written on.

3. An appellate decision upsetting three decades of administrative practice by three federal agencies and the reliance interests of so many employers would warrant this Court's immediate review in any context. The Court has regularly granted certiorari in analogous or even less compelling circumstances. *E.g.*, *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232 (2004) (granting certiorari where court of appeals rejected longstanding Federal Reserve Board interpretation); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 975 (1986) (FDA interpretation); *Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974) (BIA interpretation); *see generally* Stephen M. Shapiro et al., Supreme Court Practice 269 (10th ed. 2013) (citing ad-

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[18] Some plans were established by religious orders, *e.g.*, IRS PLR 8325131, 1983 WL 198887 (Mar. 25, 1983), which in 1977 the IRS remarkably did not consider the "church." *Supra* pp.3-4.

ditional cases). But a decision upending three decades of consistent administrative practice by three federal agencies surely warrants this Court's review in the context of ERISA, a highly reticulated scheme where agency deference is at its apex. *Beck v. PACE Int'l Union*, 551 U.S. 96, 104 (2007); *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

B. The Decisions Create Massive Upheaval and Irreversible Damage to the Administration of Pension Plans by Religious Ministries

Certiorari is additionally warranted because the consequences of the decision below and the Third and Seventh Circuit decisions are not easily undone, if at all. "Predictab[ility]" is essential under ERISA. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). Absent this Court's intervention, however, church plans around the country will be left in a state of massive uncertainty. And plans with participants in the Third, Seventh, and Ninth Circuits will have to overhaul their benefit programs in costly, potentially irreversible ways—even if they have other participants in states within circuits that follow the traditional interpretation. These consequences, which could force some organizations to stop offering defined benefit plans entirely, are described in detail in the petitions filed in *Advocate* and *Saint Peter's*. *See* Pet. 19-21 & nn.19-21 (No. 16-74); Pet. 19-21 (No. 16-86).

And if the unplanned cost of future ERISA compliance were not enough to shut pension plans or religious charities down, recovery of even a fraction of what plaintiffs seek in these cases could. Dignity Health is a nonprofit health care ministry that reasonably relied on express guidance from the IRS determining that its plan was an exempt church plan.

Yet respondent seeks billions of dollars in retroactive penalties. Respondent alleges that Dignity Health owes 60,000 putative class members $110 a day for every day that Dignity Health did not provide benefit statements or funding notices that the IRS told Dignity Health it was not required to provide. Complaint, Prayer for Relief §§ D-F. And respondent seeks that amount for three separate violations. *Id.* Stated differently, *for just one year, respondent seeks over $7.2 billion in penalties.*

And like all sponsors of ERISA-exempt church plans, Dignity Health is a nonprofit entity. In 2014, it provided $2 billion in charitable care to the poor and underserved. Dignity Health, Sustainability Highlights for Fiscal Year 2014, at 3, https://goo.gl/kkHfEv. Allowing this gotcha litigation to proceed would come at the expense of destitute citizens of California, Arizona, and Nevada who rely on the free care and other free services that Dignity Health provides.

II. The Courts of Appeals Are Divided Over the Scope of the Church Plan Exemption

Certiorari is all the more warranted because the circuits are divided over whether church-affiliated organizations may establish church plans. Contrary to the decisions of the Third, Seventh, and Ninth Circuits, the Fourth and Eighth Circuits have concluded that there is no church-establishment requirement.

1. In *Lown v. Continental Casualty Co.*, the Fourth Circuit held that "a plan established by a corporation associated with a church can still qualify as a church plan." 238 F.3d at 547. *Lown* concerned a claim for denial of benefits asserted by a former

employee of a Baptist hospital system against the insurer of her long-term disability plan. *Id.* at 546. The employee initially filed in state court, but the insurer removed, and the Fourth Circuit affirmed federal jurisdiction under ERISA, holding that the plan was not an exempt church plan. *Id.* at 547-48. The court explained that a plan established by an organization that is not a church "can still qualify as a church plan" if the plan is maintained by a qualifying church-affiliated organization under § 1002(33)(C)(i). *Id.* at 547. But the plan at issue could not satisfy § 1002(33)(C)(i) because the hospital system had dissociated from the Southern Baptist Convention and therefore was not church-affiliated. *Id.* at 548.

The Eighth Circuit reached a similar conclusion in *Chronister v. Baptist Health*, 442 F.3d 648. There, again, the former employee of a Baptist hospital system sued her former employer and the insurer of her long-term disability plan for denial of benefits. *Id.* at 650. As in *Lown*, the employee initially filed in state court, but the defendants removed, and the Eighth Circuit found federal jurisdiction under ERISA. *Id.* at 650-54. Like the Fourth Circuit, the Eighth Circuit recognized that the plan at issue, though not established by a church, would be a church plan if it were maintained by a qualifying church-affiliated organization. *Id.* at 651-52. But as in *Lown*, the plan could not meet that requirement because the hospital system had dissociated from the relevant church. *Id.* at 652.

2. In contrast to these decisions by the Fourth and Eighth Circuits, the Ninth Circuit below held that a "church plan must be established by a church." App. 5a. As the Ninth Circuit noted, it fol-

lowed recent decisions of the Third and Seventh Circuits. App. 10a; *Kaplan*, 810 F.3d at 180-81; *Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 523-27 (7th Cir. 2016).

3. The 3-2 split over whether church-affiliated organizations may establish church plans warrants this Court's review. Oddly, the Ninth Circuit did not acknowledge the decisions in *Lown* and *Chronister*. But district courts within the Fourth and Eighth Circuits regard *Lown* and *Chronister* as binding, and thus the split over the scope of the church plan exemption is already leading to inconsistent administration of the law across the country. Based on *Lown*, a district court within the Fourth Circuit recently ruled that ERISA "permits an organization that is 'controlled by or associated with a church ...' to establish a 'church plan.'" *Lann v. Trinity Health Corp.*, No. 14-cv-2237, 2015 WL 6468197, at *1 (D. Md. Feb. 24, 2015); *see* Transcript of Motion Hearing at 40, *id.*, dkt. 72 (district court explaining that "the Fourth Circuit has pretty much put [a church-establishment requirement] to rest").

A district court within the Eighth Circuit reached the same conclusion based on *Chronister*, noting that *Chronister* "voiced no concern as to whether the plan was established ... by a church." *Thorkelson*, 764 F. Supp. 2d at 1127. Numerous other district courts have relied on *Lown* and *Chronister* in concluding that plans not established by churches may qualify as church plans. *E.g.*, *Overall v. Ascension*, 23 F. Supp. 3d 816, 827 (E.D. Mich. 2014); *Ward*, 2010 WL 4337821, at *1-2.

In light of the binding precedent, the plaintiffs' firms bringing these cases have settled cases within the Fourth and Eighth Circuits on terms that permit

the defendant religious organizations to retain their church plan status—unless and until "the United States Supreme Court holds that Church Plans must be established by a church." Class Action Settlement Agreement § 4.1.4, *Lann v. Trinity Health*, No. 14-cv-02237 (D. Md. Aug. 1, 2016). In other words, absent this Court's intervention, some religious organizations will be forced to relinquish their church plan status while similarly situated organizations in other circuits will be permitted to retain it—simply by virtue of their physical location.

The circuit split is especially intolerable because many religious organizations operate in multiple states. These organizations are now facing suit in the circuits following the novel interpretation—even where they are headquartered in circuits following the traditional interpretation—and face the possibility of inconsistent judgments.[19] The prospect of circuit courts coming to differing conclusions regarding the same plan, this Court has recognized, is incompatible with ERISA's goal of national uniformity. *Conkright v. Frommert*, 559 U.S. 506, 520 (2010).

III. ERISA Does Not Require a Church To Establish an Exempt Church Plan

The text, structure, purpose, and history of the church plan exemption, as well as the constitutional avoidance canon, agency deference, and congressional ratification, all point in one direction: church plans need not be established by churches.

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[19] *See, e.g.*, *Feather v. SSM Health*, No. 16-cv-00393 (S.D. Ill. April 8, 2016) (suit in Seventh Circuit against religious organization headquartered in the Eighth Circuit).

1. The text of the church plan exemption unambiguously forecloses a church-establishment requirement. Section 1002(33)(A) provides that "[t]he term 'church plan' means a plan established and maintained ... by a church." Section 1002(33)(C)(i) in turn provides that "a plan established and maintained ... by a church"—*i.e.*, a church plan—"includes a plan maintained by [a qualifying] organization ... controlled by or associated with a church." Subparagraph C thus defines the phrase "established and maintained ... by a church" to include plans maintained by certain church-affiliated organizations—whether or not they were established by a church. As one district court explained, "if A is exempt and A includes C, then C is also exempt." *Overall*, 23 F. Supp. 3d at 828; *see Medina v. Catholic Health Initiatives*, No. 13-cv-01249, 2014 WL 4244012, at *2-3 (D. Colo. Aug. 26, 2014); Pet. 26-27, *Advocate* (No. 16-74).

The Ninth Circuit's opinion contains no textual analysis at all. *See* App. 10a. The court seemed to agree that Dignity Health's reading was "possible," *id.*, but then declared that the "more natural reading of subparagraph (C)(i) is that the phrase preceded by the word 'includes' serves only to broaden the definition of organizations that may maintain a church plan." *Id.* Yet the court did not explain why that reading was more natural, or address Dignity Health's lead textual argument—that the word "established" would not precede the word "includes" if the phrase only broadened the maintenance requirement. Under the court's reading, the word "established" is surplusage. Nor did the court explain how its interpretation was consistent with the companion tax code definition, 26 U.S.C. § 414(e)(3)(A), which parallels § 1002(33)(C)(i) and declares in its ti-

tle that the plans described in subparagraph (C)(i) are entitled to "Treatment as church plan[s]."

Notably, the Ninth Circuit did not agree with the Seventh and Third Circuit's conclusions that Dignity Health's interpretation would create surplusage or violate the *expressio unius* canon. As the petitioners in *Advocate* and *Saint Peter's* explain, those conclusions are indefensible. Pet. 27 (No. 16-74); Pet. 26 (No. 16-86).

Rather, the Ninth Circuit relied exclusively on a hypothetical statute described in the Third Circuit's opinion. Under that statute, "any person who is disabled and a veteran is entitled to free insurance," and a "person who is disabled and a veteran incudes a person who served in the National Guard." App. 10a (quoting *Kaplan*, 810 F.3d at 181). The Ninth Circuit reasoned that the "context" of that statute (but not its text) made "reasonably clear" that non-disabled Guardsmen were not entitled to free insurance. App. 10a-11a. In other words, the Ninth Circuit relied on an intuition that Congress would not have intended to extend disability benefits to non-disabled individuals. But the Ninth Circuit did not even attempt to explain why that "context" would apply to the church plan exemption. Here, the relevant federal agencies have been interpreting the exemption to cover plans maintained by church-affiliated organizations for over thirty years. And Congress had good reasons to exempt plans maintained by qualifying church-affiliated organizations regardless of whether they were established by churches. *Infra* pp.28-33.

The Ninth Circuit brushed aside three other federal statutes that presuppose that church plans need not be established by churches. The first declares

that the YMCA's pension plan will be "treated as a church plan ... which is maintained by an organization described in [§ 1002(33)(C)(i)]," Pub. L. 108-476, § 1, 118 Stat. 3901, 3901 (2004). Congress passed that statute to address concerns that the YMCA might not qualify as church-associated because it associates with Christianity generally rather than "one specific church." 149 Cong. Rec. S4378 (daily ed. Mar. 25, 2003). The statute thus clarifies that association with Christianity generally is sufficient under subparagraph (C)(i), and declares that the plan is exempt *because* it is maintained by a (C)(i) organization, though it is undisputed that the plan was not established by a church.

The Ninth Circuit asserted that the statute was inapposite because Congress simply chose to "treat[]" the YMCA plan as a church plan even though it would not otherwise qualify. App. 16a. But that analysis ignores the express legislative history declaring that, other than the question about the YMCA's church-association status, its plan was in "full compliance" with the exemption. 149 Cong. Rec. S4378 (daily ed. Mar. 25, 2003). Nor did the Ninth Circuit explain how Congress could possibly have wanted to declare that one particular Christian organization is the only organization in the country that qualifies for this exemption regardless of the entity that established its plan, or how such a statute would be constitutional.

Two tax and securities provisions reflect the same interpretation, declaring that certain exemptions are applicable to church plans, and defining church plans to include plans "establish[ed]" by "an organization described in [subparagraph (C)(i)]." 26 U.S.C. § 403(b)(9)(B); 15 U.S.C. § 77c(a)(2). Thus the

Ninth Circuit did not dispute that, under its interpretation, Dignity Health's plan qualifies a church plan for purposes of those statutory exemptions but not for purposes of the church plan exemption itself. The Ninth Circuit instead disregarded those statutes because they contain some additional minor wording changes, namely declaring that a retirement plan maintained by a church would qualify for the tax and securities exemption even if not established by a church. App. 17a. But that minor discrepancy is irrelevant because, as far as Dignity Health is aware, there *are* no church plans that are maintained by a steeple church but were established by some other entity. In other words, Dignity Health's interpretation would reconcile the statutes for all practical purposes, while the Ninth Circuit would read the two statutes to treat hundreds, probably thousands, of plans as church plans for certain tax and securities purposes but not under ERISA. For regimes as complicated as ERISA, the tax code, and securities laws, that result is highly anomalous at best. At a minimum, the immense practical difficulties created by this result further counsels for this Court's review. *See also* Brief of Church Alliance as *Amicus Curiae* in Support of Petitioners 5-11 (Nos. 16-74, 16-86) (describing additional difficulties posed in light of the new decisions by securities and tax laws whose church plan definitions mirror § 1002(33)(C)(i)).

2. Congress enacted § 1002(33)(C)(i) to resolve doubts regarding plans that were not only maintained but also *established* by pension boards. As Senator Talmadge explained, the 1974 exemption left uncertain whether such a plan "is *established* by a church, as it must be [under the 1974 statute], or by a pension board"—*i.e.*, an affiliated organization that is not itself the church. 125 Cong. Rec. 10,052

(emphasis added). Section 1002(33)(C)(i) answers that question by declaring that a "plan maintained by a pension board" or the like "*is a church plan*," 126 Cong. Rec. 20,245 (1980) (emphasis added), whether established by a church or not. *Accord* 124 Cong. Rec. 12,107 (1978) ("A plan or program funded or administered through a pension board ... will be considered a church plan."). The Ninth Circuit's assertion that the legislative history is "clear" that "subparagraph (C)(i) addressed only the problem of maintenance by church-controlled or church-affiliated pension boards" (App. 14a) simply ignores these express statements in the legislative history about establishment by pension boards, which were cited in Dignity Health's opening and reply brief.

Nothing in the history or purpose of the 1980 amendments supports a church-establishment requirement. The Ninth Circuit did not point to any language in the legislative history suggesting that Congress intended to retain such a requirement. App. 11a-15a. To the contrary, all of the passages the Ninth Circuit cited indicate that the church plan definition would include plans maintained by church-affiliated organizations, full stop. App. 14a-15a.[20]

Moreover, as the petitioners in *Advocate* and *Saint Peter's* explain, Congress's decision to permit church plans to cover employees of church-affiliated organizations, 29 U.S.C. § 1002(33)(C)(ii)-(iii), and to

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[20] The statement that the "legislation[] retains the definition of church plan as a plan established and maintained ... by a church" (App. 14a) is simply referring to the retention of the principal definition in subparagraph (A), not limiting the scope of the modification in (C). Otherwise, that statement would be inconsistent with Congress's undisputed intent to expand the maintenance requirement.

be maintained by church-affiliated organizations, *id.* § 1002(33)(C)(i), further confirms that Congress did not intend to retain the church-establishment requirement. Pet. 29, *Advocate* (No. 16-74); Pet. 28-29, *Saint Peter's* (No. 16-86).

3. Allowing church-affiliated organizations to establish church plans also avoids grave constitutional doubts. When Congress amended the exemption in 1980, it recognized that the original 1974 exemption discriminated against "congregational" denominations, in which local churches are independent and autonomous. 125 Cong. Rec. 10,052; 124 Cong. Rec. 12,107. Judaism and most Protestant religions are congregational, for example, while the Catholic Church is hierarchical. Then as now, congregational denominations typically formed independent organizations—separate from any individual church, but controlled by or associated with the denomination as a whole—to establish, fund, and administer pension plans for multiple local churches and affiliated agencies. *Id.* Referring expressly to the 1974 statute's church-establishment requirement, the amendment's sponsor explained that the "requirement also points up the inapplicability of the church plan definition to congregational churches." 125 Cong. Rec. 10,052. The amendment removed the "statutory cloud" over plans affiliated with those denominations. *Id.*

Requiring church plans to be established by churches themselves would resurrect the problem Congress sought to solve, forcing members of congregational denominations either to radically reorganize their pension programs, or to forgo their exemption from ERISA. But "religious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, matters of

church government as well as those of faith and doctrine." *Serbian E. Orthodox Diocese for U.S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 721-22 (1976) (quotation marks and brackets omitted). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The Ninth Circuit held that denominational discrimination is a permissible side effect of lines formally drawn along some other dimension, like organizational form. App. 22a-23a. This astonishing holding is directly contrary to *Larson*, which held unconstitutional a law that imposed registration and reporting requirements only upon religious organizations that solicited more than 50 percent of their funds from nonmembers. 456 U.S. at 230, 255. The Supreme Court held that the law discriminated against new religious organizations in favor of well-established ones. *Id.* at 246 n.23. Here, a church-establishment requirement discriminates against congregational denominations where churches operate autonomously and independently.

And for hierarchical and congregational denominations alike, the church-establishment requirement would throw the government and religious employers right back into the pre-1980, constitutionally dubious morass, in which government bureaucrats decided on a case-by-case basis whether a particular organization was a "church." *Supra* pp.3-4. Under that regime, the IRS asked whether the organization was primarily focused on prayer, and concluded that Catholic sisters are not the "church"—the very conclusion that prompted Congress to amend the statute. IRS GCM 37,266, 1977 WL 46200, at *4-5. The

Ninth Circuit stated that no "forbidden inquiry into matters of religious doctrine" is required, and that that "is not the inquiry that courts or agencies actually employ," citing cases involving other statutes. App. 24a. Oddly, the court ignored that such a forbidden inquiry *is* the inquiry the IRS employed, prior to the amendment, to analyze religious status for purposes of the church plan exemption.

The decision below would resurrect that regime, creating impermissible, and unnecessary, government entanglement with religion. That result is apparent from this very case. Congregations of Catholic women religious controlled Dignity Health when the Plan was established and signed the document establishing the Plan, and Dignity Health contends that those congregations established its plan. Under the Ninth Circuit's decision, the IRS and the courts will be forced once more to determine whether congregations of Catholic sisters qualify as "the church."

The Ninth Circuit further concluded that the government's (and petitioners') interpretation of the church plan exemption creates the same problem, App. 23a-24a, but that is incorrect. To be sure, under any interpretation, the organization that maintains the plan must be "controlled by or associated with" a church. 29 U.S.C. § 1002(33)(C)(i). But the statutory test for association is not exacting, requiring only that the organization "share[] common religious bonds and convictions with [a] church." *Id.* § 1002(33)(C)(iv). Petitioners are unaware of any case presenting a dispute over whether the entity with which an organization claims association is in fact a church. For example, Dignity Health is associated with the Catholic Church, and respondent has never disputed that the Catholic Church is a church.

And Congress passed the 1980 amendment because it recognized that "[c]hurch agencies are, in fact, part of the churches" and deserve equal treatment for purposes of ERISA. 125 Cong. Rec. 10,052. By upsetting that principle, the decision below raises grave constitutional concerns. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987).

4. It was unconscionable for the court to brush past the consistent, longstanding, unanimous interpretation of all three responsible federal agencies. App. 18a-19a. The Ninth Circuit concluded that the IRS, DOL, and PBGC interpretations of the exemption were "unpersuasive," and thus ineligible for *Skidmore* deference. App. 19a-20a. As an initial matter, courts must defer to PBGC interpretations of ERISA if the "PBGC's policy is based upon a permissible construction of the statute," regardless of whether the interpretation emerged from notice-and-comment rulemaking. *Beck*, 551 U.S. at 104 (deferring to PBGC interpretation in *amicus* brief). The Ninth Circuit ignored *Beck*.

But *Beck* aside, the Ninth Circuit's reasoning was flawed at every turn. First, the Ninth Circuit concluded that the IRS's 1983 General Counsel Memorandum was unpersuasive because it purportedly had declared that a plan maintained by the

Catholic Church would qualify under subparagraph (A) "regardless of what entity established the plan." App. 19a. But the Memorandum does not say that. Second, the Ninth Circuit accused the IRS of "ignor[ing] the relevant legislative history." App. 19a. But there *is* no "legislative history indicating that, in adopting subparagraph (C)(i), Congress did not intend to alter ERISA's [church-establishment] requirement." App. 19a-20a. Ironically, the Ninth Circuit ignored the legislative history the IRS *did* cite. IRS GCM 39,007, 1983 WL 197946, at *6 n.1. The Ninth Circuit then ignored the 550 subsequent rulings from the IRS and the DOL, on which countless entities like Dignity Health have been relying for decades at the agencies' express invitation. Rev. Proc. 2016-1, 2016-1 I.R.B. 1, § 11.01; ERISA Proc. 76-1, § 10. The court inexplicably declared that there were only "several" such rulings." App. 20a; *but see* Pet. App. 64a-111a (No. 16-74) (listing the rulings).

Finally, Congress has ratified the agencies' position by repeatedly revisiting § 1002(33) and § 414(e) without disturbing the longstanding administrative interpretation. *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 561 (1991). Congress has incorporated the church plan definition into more than a dozen provisions across the U.S. Code, and is "presumed to have had knowledge of the interpretation given to the incorporated law." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *supra* n.4. Congress also has repeatedly amended ERISA's definition section in general, and the church plan definition in particular, without altering § 1002(33)(C)(i), which is "persuasive evidence that the [administrative] interpretation is the one intended by Congress." *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quotation marks omitted); *supra* n.3.

* * * * *

Lower courts and religious employers desperately need definitive resolution of this important recurring question of ERISA coverage. While the Court could call for the views of the Solicitor General, all three federal agencies have already weighed in for decades, and the Solicitor General can set forth his views at the merits stage. Unless and until this Court acts, lower courts around the country will be saddled with unnecessary litigation and confusion over ERISA's church plan exemption. And in the meantime, delaying this Court's review exposes religious nonprofit ministries all over the country that reasonably relied on settled law to burdensome litigation, devastating uncertainty over their continuing legal obligations, and the risk of adverse judgments imposing crippling liability and forcing potentially irrevocable changes to their pension plans.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

BARRY S. LANDSBERG
HARVEY L. ROCHMAN
JOANNA S. MCCALLUM
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4000

LISA S. BLATT
Counsel of Record
ELISABETH S. THEODORE
ARNOLD & PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Petitioners

August 29, 2016

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15-15351

D.C. No. 3:13-cv-01450-TEH

STARLA ROLLINS, on behalf of herself, individually, and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

DIGNITY HEALTH, a California non-profit corporation; HERBERT J. VALLIER, an individual,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of California Thelton E. Henderson, Senior District Judge, Presiding

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Argued and Submitted February 8, 2016
San Francisco, California

Filed July 26, 2016

OPINION

Before: A. Wallace Tashima and William A. Fletcher, Circuit Judges and Robert W. Gettleman,* Senior District Judge.

Opinion by Judge W. Fletcher

SUMMARY**

Employee Retirement Income Security Act

Affirming the district court's partial summary judgment in favor of the plaintiff, the panel held that Dignity Health's pension plan was subject to the requirements of the Employee Retirement Income Security Act and did not qualify for ERISA's church-plan exemption.

Agreeing with other circuits, the panel held that a church plan must be established by a church or by a convention or association of churches and must be maintained either by a church or by a church-controlled or church-affiliated organization whose principal purpose or function is to provide benefits to church employees. The panel remanded the case to the district court for further proceedings.

COUNSEL

Lisa S. Blatt (argued), Elisabeth S. Theodore, and William C. Perdue; Arnold & Porter LLP, Washington, D.C.; Barry S. Landsberg, Harvey L. Rochman, and Joanna S. McCallum; Manatt, Phelps & Phillips, LLP,

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* The Honorable Robert W. Gettleman, Senior District Judge for the U.S. District Court for the Northern District of Illinois, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Los Angeles, California; David L. Shapiro, Cambridge, Massachusetts; Charles M. Dyke, Nixon Peabody LLP, San Francisco, California; for Defendants-Appellants.

Ron Kilgard (argued) and Laurie Ashton, Keller Rohrback LLP, Phoenix, Arizona; Lynn L. Sarko, Havila C. Unrein, and Matthew M. Gerend; Keller Rohrback LLP, Seattle, Washington; Bruce Rinaldi, Karen L. Handorf, and Michelle C. Yau; Cohen Milstein Sellers & Toll, PLLC, Washington, D.C.; for Plaintiff-Appellee.

Shay Dvoretzky and Emily J. Kennedy, Jones Day, Washington, D.C., for Amici Curiae Alliance Defending Freedom and Thomas More Society.

David Cortman, Erik Stanley, and Jordan Lorence, Washington, D.C., as and for Amicus Curiae Alliance Defending Freedom.

Mark E. Chopko, Marissa Parker, and Brandon Riley, Stradley Ronon Stevens & Young LLP, Washington, D.C.; Lisa Gilden, The Catholic Health Association of the United States, Washington, D.C.; James F. Sweeney and John M. Cox; Sweeney, Greene & Roberts, LLP, Elk Grove, California; for Amici Curiae The Catholic Health Association of the United States, and The Alliance of Catholic Health Care.

G. Daniel Miller, Conner & Winters, LLP, Washington, D.C.; Laurence A. Hansen and Hugh S. Balsam, Locke Lord LLP, Chicago, Illinois; for Amici Curiae Guidestone Financial Resources of the Southern Baptist Convention, The Pension Boards—United Church of Christ, Inc., and The Church Alliance.

Michael Reiss and John A. Goldmark, David Wright Tremaine LLP, Seattle, Washington; Howard Shapiro, Robert Rachal, and Stacey Cerrone; Proskauer Rose

LLP, New Orleans, Louisiana; for Amicus Curiae Providence Health & Services.

James A. Sonne, Stanford Law School Religious Liberty Clinic, Stanford, California, for Amicus Curiae Becket Fund for Religious Liberty.

Mary Ellen Signorille, AARP Foundation Litigation, Washington, D.C., for Amicus Curiae AARP.

Andrew L. Seidel, Madison, Wisconsin, as and for Amicus Curiae Freedom From Religion Foundation.

Daniel Mach, Washington, D.C., as an for Amicus Curiae American Civil Liberties Union Foundation.

Elizabeth O. Gill, San Francisco, California, as and for Amicus Curiae ACLU Foundation of Northern California, Inc.

Richard B. Katskee and Gregory M. Lipper, Washington, D.C., as and for Amicus Curiae Americans United for Separation of Church and State.

Ronald Dean, Law Office of Ronald Dean, Pacific Palisades, California; Karen W. Ferguson, Pension Rights Center, Washington, D.C.; Norman P. Stein, Philadelphia, Pennsylvania; for Amicus Curiae Pension Rights Center.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiff-Appellee Starla Rollins filed this putative class action against her former employer, Defendant-Appellant Dignity Health, its Chief Human Resources Officer, unnamed members of its Retirement Subcommittee, and other unnamed fiduciaries (collectively "Dignity Health"), alleging that Dignity Health has not maintained its pension plan in compliance with the Employee Retirement Income Security Act of 1974

("ERISA"), 29 U.S.C. § 1001 *et seq.* Dignity Health concedes it has not complied with ERISA, but contends its plan qualifies for ERISA's church-plan exemption. *See id.* §§ 1002(33), 1003(b)(2). The district court held that a pension plan must have been established by a church, or by a convention or association of churches, to qualify as a church plan. Because the district court found that Dignity Health's pension plan was not established by a church, or by a convention or association of churches, the court awarded partial summary judgment to Rollins, ruling that Dignity Health's pension plan must comply with ERISA. We accepted jurisdiction in this interlocutory appeal to address whether the district court was correct to hold that a church plan must be established by a church or by a convention or association of churches. We affirm the district court's answer to that question and remand for further proceedings.

I. Background

Because this appeal comes to us from the district court's award of summary judgment to Rollins, we relate the facts in the light most favorable to Dignity Health. *See Nolan v. Heald Coll.*, 551 F.3d 1148, 1150 (9th Cir. 2009). In the early 1980s, the Sisters of Mercy Congregations in Auburn, California and Burlingame, California (the "Sponsoring Congregations") each established nonprofit hospital systems. In 1986, the Sponsoring Congregations merged the two systems to form Catholic Healthcare West ("CHW"). Employees in the CHW system received pension benefits through seven plans, separately maintained either by a Sponsoring Congregation, by an individual hospital, or by CHW. On January 1, 1989, the Sponsoring Congregations, the hospitals, and CHW merged these plans into a single pension plan (the "Plan"). On July 20, 1992,

CHW's board of directors adopted a retroactive resolution to treat the Plan as a church plan. CHW's name was later changed to "Dignity Health" as a result of corporate restructuring.

From 1986 to 2012, Plaintiff Starla Rollins worked as a billing coordinator for San Bernardino Community Hospital, which became affiliated with CHW and adopted the Plan in August 1998. On November 20, 1998, Rollins was sent a summary plan description, notifying her that CHW considers the Plan to be a church plan and therefore exempt from ERISA. Rollins became a participant in the Plan on January 1, 1999. She will be eligible for pension benefits from the Plan when she reaches retirement age.

Rollins filed this putative class action against Dignity Health, alleging that Dignity Health has violated numerous ERISA requirements. The complaint alleges, first, that the Plan is not a church plan and, second, that ERISA's church-plan exemption is unconstitutional. Rollins seeks declaratory relief, money damages, statutory penalties, injunctive relief, and attorney's fees.

Dignity Health concedes that the Plan does not comply with ERISA, but contends that the Plan need not do so because it qualifies for the church-plan exemption under 29 U.S.C. § 1002(33)(C)(i) (for convenience, "subparagraph (C)(i)"). Dignity Health contends that under subparagraph (C)(i) a church plan need not have been established by a church or by a convention or association of churches (for convenience, "church") if it is maintained by a church-controlled or church-affiliated organization whose principal purpose or function is to provide benefits to church employees (for convenience, "principal-purpose organization").

The district court granted partial summary judgment against Dignity Health, holding that, to qualify for the church-plan exemption under subparagraph (C)(i), a plan must be established by a church *and* maintained either by a church or by a principal-purpose organization. *See Rollins v. Dignity Health*, 59 F. Supp. 3d 965 (N.D. Cal. 2014); *see Rollins v. Dignity Health*, 19 F. Supp. 3d 909 (N.D. Cal. 2013). The district court did not reach the question whether the church-plan exemption is constitutional.

The district court certified its order for interlocutory appeal because the question whether a plan must have been established by a church to qualify as a church plan under § 1002(33)(C)(i) is "a controlling question of law as to which there is substantial ground for difference of opinion and [because] an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b). We accepted jurisdiction. The district court stayed proceedings pending appeal.

II. Standard of Review

We review *de novo* rulings on cross-motions for summary judgment. *Trunk v. City of San Diego*, 629 F.3d 1099, 1105 (9th Cir. 2011). "Summary judgment is appropriate when, with the evidence viewed in the light most favorable to the non-moving party, there are no genuine issues of material fact, so that the moving party is entitled to a judgment as a matter of law." *Grenning v. Miller-Stout*, 739 F.3d 1235, 1238 (9th Cir. 2014) (citation and internal quotation marks omitted); Fed. R. Civ. P. 56(a).

III. Discussion

Congress enacted ERISA to protect "the interests of participants in employee benefit plans and their

beneficiaries by setting out substantive regulatory requirements for employee benefit plans and to provide for appropriate remedies, sanctions, and ready access to the Federal courts." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (citations and internal quotation marks omitted). ERISA does not require employers to create benefit plans or require the provision of specific benefits once a plan is created. However, ERISA does seek "to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Church plans are exempt from ERISA's regulatory requirements unless the church waives the exemption. 29 U.S.C. §§ 1003(b)(2), 1321(b)(3); *see* 26 U.S.C. § 410(d).

For the reasons that follow, we agree with the district court that, in order to qualify for the church-plan exemption under subparagraph (C)(i), a plan must have been established by a church *and* maintained either by a church or by a principal-purpose organization.

A. Statutory Text

In interpreting a statute, "[w]e look first at the plain language, examining not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy. If the statutory language is unambiguous, our inquiry is at an end. If the language is ambiguous, then we examine legislative history, and also look to similar provisions within the statute as a whole and the language of related or similar statutes to aid in interpretation." *Gladstone v. U.S. Bancorp*, 811 F.3d 1133, 1138 (9th Cir. 2016) (citations and internal quotation marks omitted). Two statutory provisions are directly relevant to this appeal.

First, church plans are exempt from otherwise applicable requirements of ERISA: "The provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is a church plan (as defined in section 1002(33) of this title)[.]" 29 U.S.C. § 1003(b)(2).

Second, a "church plan" is defined as follows:

> (33)(A) The term "church plan" means a plan established and maintained . . . by a church or by a convention or association of churches[.]
>
> . . .
>
> (C) For purposes of this paragraph—
>
> (i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches *includes* a plan maintained by an organization . . . the principal purpose or function of which is the administration of funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

29 U.S.C. § 1002(33) (emphasis added).

To make our discussion easier to follow, we describe the essential structure of the foregoing provisions: Paragraph 1003(b)(2) provides that a church plan is exempt from ERISA. Paragraph 1002(33)(A) provides that in order to qualify for the church-plan exemption, a plan must be both established and maintained by a church. Subparagraph (C)(i) provides that a plan

established and maintained by a church "includes" a plan maintained by a principal-purpose organization.

There are two possible readings of subparagraph (C)(i). First, the subparagraph can be read to mean that a plan need only be maintained by a principal-purpose organization to qualify for the church-plan exemption. Under this reading, a plan maintained by a principal-purpose organization qualifies for the church-plan exemption even if it was established by an organization other than a church. Second, the subparagraph can be read to mean merely that maintenance by a principal-purpose organization is the equivalent, for purposes of the exemption, of maintenance by a church. Under this reading, the exemption continues to require that the plan be established by a church.

We conclude that the more natural reading of subparagraph (C)(i) is that the phrase preceded by the word "includes" serves only to broaden the definition of organizations that may maintain a church plan. The phrase does not eliminate the requirement that a church plan must be established by a church. The other circuit courts that have considered the question agree with this reading. *See Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175, 180–81 (3d Cir. 2015); *Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 523–27 (7th Cir. 2016). The Third Circuit provides the following helpful illustration: "[A]ny person who is disabled and a veteran is entitled to free insurance. . . . [A] person who is disabled and a veteran includes a person who served in the National Guard." *Kaplan*, 810 F.3d at 181. It is reasonably clear from context that a person who served in the National Guard satisfies the requirement that he or she be a veteran, but that this person qualifies for free

insurance only if he or she is also disabled. Similarly, in subparagraph (C)(i), it is reasonably clear from context that a plan maintained by a principal-purpose organization satisfies the requirement that it be maintained by a church, but that the plan qualifies as a church plan only if it was also established by a church.

B. Legislative History

Our reading is supported by legislative history. As originally enacted in 1974, ERISA defined the term "church plan" as follows:

> (A) The term "church plan" means
>
> (i) a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954, or
>
> (ii) a plan described in subparagraph (C).
>
> . . . .
>
> (C) . . . [A] plan in existence on January 1, 1974, shall be treated as a "church plan" if it is established and maintained by a church or convention or association of churches for its employees and employees of one or more agencies of such church (or convention or association) . . . , and if such church (or convention or association) and each such agency is exempt from tax under section 501 of the Internal Revenue Code of 1954. The first sentence of this subparagraph shall not apply to any plan maintained for employees of an agency with respect to which the plan

> was not maintained on January 1, 1974. The first sentence to this subparagraph shall not apply with respect to any plan for any plan year beginning after December 31, 1982.

29 U.S.C. § 1002(33)(A), (C) (1976). The parties' dispute would have been easily resolved under ERISA's originally enacted text, which unambiguously provided that a church plan must have been established by a church. But this text was amended in the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), to provide the current text of § 1002(33)(C)(i)–(iii).

Dignity Health contends that the current subparagraph (C)(i) eliminated the requirement that a plan be established by a church if a plan is maintained by a principal-purpose organization. As the "party contending that legislative action changed settled law," Dignity Health has the "burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521–22 (1989).

Dignity Health argues that subparagraph (C)(ii) supports its interpretation of subparagraph (C)(i). This subparagraph provides in relevant part:

> (ii) The term employee of a church or a convention or association of churches includes—
>
> (I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;
>
> (II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax

> under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; and
>
> (III) an individual described in clause (v).

Dignity Health contends that this subparagraph shows that Congress intended in subparagraph (C)(i) to eliminate the requirement that a plan be established by a church whenever a plan is administered by a principal-purpose organization. In particular, Dignity Health argues in its brief that, "If a church plan may cover employees of a church-associated organization, and a church-associated organization may maintain the plan, Congress had no reason to insist that the church itself must establish the plan." (Internal quotation marks omitted.) This argument is based on a misreading of the legislative history.

Congress' reason for enacting subparagraph (C)(ii) is clear from the legislative record. Before ERISA was enacted, many churches had allowed employees of church-associated organizations, such as hospitals and schools, to participate in the churches' pension plans. As originally enacted, ERISA allowed plans covering the employees of such organizations to qualify as church plans only until December 31, 1982. After that date, plans including employees of such organizations would either have had to comply with ERISA or divide into separate plans. Separation would have imposed significant hardships, including increased plan maintenance costs and limitations on the free movement of employees between a church and its associated organizations. *See* 125 Cong. Rec. 10,052 (May 7, 1979) (statement of Sen. Talmadge). In response to this concern, Congress eliminated the sunset provision of former paragraph (C) and added

subparagraph (C)(ii) to expand the definition of employees who were eligible to participate in a church plan. After the adoption of subparagraph (C)(ii), employees of church-associated organizations became eligible to participate.

Congress' reason for enacting subparagraph (C)(i) was different. Subsection 1002(C), as it existed until 1980, required that a church plan be maintained by a church. In codifying this requirement, Congress inadvertently excluded plans maintained (*i.e.*, administered) by church-controlled or church-affiliated pension boards rather than by churches themselves. *See, e.g.*, 125 Cong. Rec. 10,053 (May 7, 1979) (statement of Sen. Talmadge). Congress relaxed this requirement by adding the language in subparagraph (C)(i) that specifies that a plan maintained by a church-controlled or church-affiliated principal-purpose organization, such as a pension board, qualifies as a plan maintained by a church. The legislative history is clear that subparagraph (C)(i) addressed only the problem of maintenance by church-controlled or church-affiliated pension boards. *See, e.g.*, 125 Cong. Rec. 10,052 (May 7, 1979) (statement of Sen. Talmadge) ("Our legislation[] retains the definition of church plan as a plan established and maintained for its employees by a church or by a convention or association of church[es] exempt from tax under section 501."); *id.* at 10,053 ("No church plan administered or funded by a pension board would be disqualified merely because it is separately incorporated."); 126 Cong. Rec. 20,245 (July 29, 1980) ("[Mr. Talmadge:] May I ask whether the bill would enable a church pension board to maintain a church plan? [Mr. Long:] Yes."); Sen. Labor & Hum. Resources Com. Rep. on H.R. 3904 (Aug. 15, 1980) (noting that the former definition of a church plan "would be continued" and only "clarified to

include plans maintained by a pension board maintained by a church"); Sen. Com. on Fin., Exec. Sess., at 40 (June 12, 1980) ("The definition [of a church plan] would also be expanded to include church plans which rather than being maintained directly by a church are instead maintained by a pension board maintained by a church.").

Thus, subparagraph (C)(ii), on the one hand, and subparagraph (C)(i), on the other, addressed two quite different problems. There is nothing in the legislative history of subparagraph (C)(ii) to suggest that Congress intended, in expanding the definition of eligible employees, to eliminate the requirement that a church plan be established by a church. Nor is there anything in the legislative history of subparagraph (C)(i) to suggest that Congress intended, in broadening the definition of organizations that are authorized to maintain a church plan, to eliminate that same requirement.

C. Related Statutes

Dignity Health maintains that language in three federal statutes enacted after MPPAA supports its reading of subparagraph (C)(i). As defined in these three statutes, the terms "church plan" and "[r]etirement income account[] provided by [a] church[]" do not require that a plan or account be established by a church. Dignity Health contends that we must presume that Congress intended the term "church plan" in ERISA to have the same meaning as in these statutes. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 254 (1994). We disagree.

First, Dignity Health cites a statute, enacted in 2004, providing:

> For purposes of sections 401(a) and 403(b) of the Internal Revenue Code of 1986, any retirement plan maintained by the YMCA Retirement Fund as of January 1, 2003, shall be *treated as* a church plan (within the meaning of section 414(e) of such Code) which is maintained by an organization described in section 414(e)(3)(A) of such Code.

Pub. L. No. 108-476, 118 Stat. 3901 (2004) (emphasis added). Section 414(e)(3)(A) of the Internal Revenue Code is identical in all relevant respects to 29 U.S.C. § 1002(33)(C)(i). Thus, the statute above provides that a plan maintained by the YMCA Retirement Fund shall be "treated as" a church plan maintained by a principal-purpose organization, regardless of what entity established the plan. Pointing to this statute, Dignity Health suggests that a church plan need not be established by a church, as long as it is maintained by the appropriate type of organization. The statute above, however, does not indicate a congressional intent to interpret or redefine the meaning of the term "church plan" in other federal statutes. Instead, the statute specifies that plans maintained by the YMCA Retirement Fund will be "treated as" church plans, even though they are not, in fact, church plans.

Second, Dignity Health cites two investment statutes — the Tax Equity and Fiscal Responsibility Act of 1982 and the Church Plan Investment Clarification Act of 2012. These statutes define the term "[r]etirement income account[] provided by [a] church[]" as a plan that is established *or* maintained by a church, and for purposes of those provisions only, a church-controlled or church-affiliated principal-purpose organization qualifies as a "church." *See* 26 U.S.C. § 403(b)(9)(B); 15 U.S.C. § 77c(a)(2) (referring

to accounts "described in section 403(b)(9) of Title 26"). Thus, to qualify as a "[r]etirement income account[] provided by [a] church[]" under these statutes, a plan need not have been established by a church. Dignity Health contends that it would be "anomalous" if the term "church plan" in ERISA had a different meaning from the term "[r]etirement income account[] provided by [a] church[]" in these statutes.

This argument is of little help to Dignity Health, as it proves too much. Construing the term "church plan" in ERISA to have the same meaning as "[r]etirement income account[] provided by [a] church" in these tax and securities laws would contradict Dignity Health's own construction of ERISA. Dignity Health concedes that, to qualify as a church plan under 29 U.S.C. § 1002(33)(A), a plan maintained by a church (rather than a principal-purpose organization) must also have been established by a church. Yet under the two statutes just described, an account qualifies as a "[r]etirement income account[] provided by [a] church" if it is maintained by a church, regardless of what entity established the account.

Further, we do not construe terms to have the same meaning when Congress expressly defines the terms differently. *See Loughrin v. United States*, — U.S. —, 134 S. Ct. 2384, 2390 (2014). ERISA defines the term "church plan" as a plan that is established *and* maintained by a church. The two statutes that Dignity Health cites define the term "[r]etirement income account[] provided by [a] church[]" as a plan that is established *or* maintained by a church or a church-controlled or church-affiliated principal-purpose organization. We presume Congress intended these disparate definitions to signify a difference in meaning.

Indeed, these differences mirror differences in definitions contained in 29 U.S.C. § 1002 itself. *Compare* § 1002(32) (defining the term "governmental plan" as a plan "established or maintained" by the government of any state, political subdivision of a state, or agency or instrumentality of a state or subdivision) *with* § 1002(33) (defining the term "church plan" as a plan "established and maintained" by a church (or a convention or association of churches)).

D. Agency Interpretations

Dignity Health contends we must defer to the view expressed by the Internal Revenue Service that a plan qualifies as a church plan if it is maintained by a principal-purpose organization. We disagree.

An agency's interpretation of a federal statute is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Otherwise, it is entitled to deference proportional only to its "power to persuade." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587–88 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Dignity Health maintains we should defer to a 1983 General Counsel Memorandum ("GCM") from the Internal Revenue Service ("IRS"). *See* I.R.S. Gen. Couns. Mem. 39,007, 1983 WL 197946 (July 1, 1983). The GCM addressed "[w]hether a retirement plan covering the lay employees of a religious order whose main activity is the operation of nursing homes or

hospitals can be a 'church plan' within the meaning of [the Internal Revenue Code § 414(e)]." 1983 WL 197946 at *1. The agency first determined that the retirement plans in question had not been established by a church, as required by 26 U.S.C. § 414(e)(2)(A), because the religious orders were not "churches" within the meaning of the Internal Revenue Code. *Id.* at *5. However, the agency opined that the plans could qualify as church plans if they were "maintained either by the Catholic Church, which [qualifies] as a church, or by an organization described in section 414(e)(3)(A)"—that is, by a church-affiliated principal-purpose organization. *Id.*

GCMs "are legal memoranda from the Office of Chief Counsel to the IRS prepared in response to a formal request for legal advice from the Assistant Commissioner." *Tupper v. United States*, 134 F.3d 444, 448 (1st Cir. 1998). Like many GCMs, the GCM on which Dignity Health relies includes a disclaimer that it is "not to be relied upon or otherwise cited as precedent by taxpayers." 1983 WL 197946, at *6. We therefore give only *Skidmore* deference to the GCM.

The GCM's interpretation is unpersuasive. It is based on an obvious misreading of the statutory text, and it ignores the relevant legislative history. In the GCM, the agency opined that a plan may qualify as a church plan if it is maintained by the Catholic Church, regardless of what entity established the plan. That conclusion is based on a clear misreading of the text. As Dignity Health itself concedes, a plan maintained by a church must also be established by a church to qualify as a church plan. *See* 29 U.S.C. § 1002(33)(A). Further, the GCM does not analyze the legislative history indicating that, in adopting subparagraph (C)(i), Congress did not intend to alter ERISA's

requirement that a church plan must have been established by a church. We therefore agree with the Third and Seventh Circuits that the GCM is not entitled to deference. *See Kaplan*, 810 F.3d at 185; *Stapleton*, 817 F.3d at 530.

Several other administrative actions and regulations have relied upon and adopted the 1983 GCM's reading of the statute, without altering or expanding upon its analysis. *See* I.R.S. Priv. Ltr. Rul. 200023057, 2000 WL 1998090 (Mar. 20, 2000); I.R.S. Priv. Ltr. Rul. 9717039, 1997 WL 200940 (Jan. 31, 1997); I.R.S. Priv. Ltr. Rul. 9525061, 1995 WL 372553 (Mar. 28, 1995); I.R.S. Priv. Ltr. Rul. 9409042, 1993 WL 596409 (Dec. 8, 1993); Op. Ltr. of Pension & Welf. Benefits Admin., 2000 WL 33146430 (2000); Dep't of Labor, Advisory Op. No. 96-19A, 1996 WL 556109 (Sept. 30, 1996); Pens. Benefit Guar. Corp., *Questions to the PBGC and Summary of Their Responses* 25 (Mar. 2011). For the reasons above, these actions and regulations are also not entitled to deference.

Dignity Health also contends that Congress has acquiesced in the IRS's interpretation of the church-plan exemption. But "[c]ongressional acquiescence can only be inferred when there is overwhelming evidence that Congress explicitly considered the precise issue presented to the court." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (citations and internal quotation marks omitted). There is no evidence, let alone "overwhelming evidence," that Congress gave such consideration to this precise issue in a later-enacted statute.

E. Constitutional Avoidance

Dignity Health contends our reading conflicts with the Religion Clauses of the First Amendment and asks

us to construe the statute to avoid these conflicts. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). We conclude that there are no such conflicts.

Dignity Health argues that our reading conflicts with the Establishment Clause in three respects.

First, Dignity Health suggests that our reading of subparagraph (C)(i) discriminates against certain religious organizations by exempting plans established by churches, but not those established by other religious organizations. Dignity Health contends that § 1002(33) should be read to authorize all religious groups, however organized, to establish church plans. Subparagraph (C)(i) cannot plausibly be construed as Dignity Health suggests. Subparagraph (C)(i) does not refer generally to just any sort of religious organization; it refers specifically to church-controlled or church-affiliated principal-purpose organizations, such as pension boards. Thus, Dignity Health's argument can only be understood as an outright constitutional challenge to the church-plan exemption itself — a challenge Dignity Health surely does not intend to advance.

Such a challenge, moreover, would be baseless. For the proposition that the distinction between churches and other religious groups is constitutionally suspect, Dignity Health cites our decision in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam). *Spencer* held that a religious employer qualified for Title VII's "religious corporation" exemption, even though it was not a church. *Id.* at 724. The panel majority in *Spencer* reached that conclusion based in part on a desire to avoid constitutional doubts about providing a statutory exemption to churches but not other religious groups. *Id.* at 728–29 (O'Scannlain, J., concurring, joined by Kleinfeld, J.). To express doubts

about a constitutional issue is not to decide that issue. *Cf. Barapind v. Enomoto*, 400 F.3d 744, 750–51 (9th Cir. 2005) (en banc) (holding that an issue decided by a panel majority constitutes a holding of the circuit). Indeed, one of the primary justifications for the constitutional avoidance doctrine is to avoid unnecessary constitutional decisions. *See Rust v. Sullivan*, 500 U.S. 173, 190–91 (1991).

We do not share the doubts expressed in *Spencer*. Numerous federal statutes have long drawn the distinction between churches and other religious organizations. *See, e.g.*, 26 U.S.C. § 170(b)(1)(A)(ii) (allowing deductions for charitable contributions to churches); *id.* § 514(b)(3)(E) (providing special rules for debt-financed properties belonging to a church); *id.* § 6033(a)(3)(A)(i) (requiring tax-exempt organizations, other than churches, to file Form 990 tax returns); *id.* § 7611 (providing churches with enhanced protection from IRS audits). We agree with our sister circuits that these statutes are constitutional because they distinguish between churches and other religious organizations based on "neutral, objective organizational criteria." *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1199–1201 (10th Cir. 2015), *vacated on other grounds*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *see Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 272 (D.C. Cir. 2014), *vacated on other grounds*, *Zubik*, 136 S. Ct. 1557; *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 443 (3d Cir. 2015), *vacated on other grounds*, *Zubik*, 136 S. Ct. 1557; *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 560 (7th Cir. 2014), *vacated on other grounds*, 135 S. Ct. 1528 (2015) (mem.).

Second, Dignity Health contends that our reading, by distinguishing between religious institutions based on organizational form, will inevitably lead to invidious discrimination based on denomination and religious belief. Dignity Health provides no support for this assertion other than citations to *Larson v. Valente*, 456 U.S. 228 (1982), *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008), and *University of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002). None of these cases supports Dignity Health's argument. Each was directly "concerned with lines drawn based on denomination, rather than organizational form or purpose." *Priests for Life*, 772 F.3d at 273; *see Larson*, 456 U.S. at 246–48; *Colo. Christian Univ.*, 534 F.3d at 1258; *Univ. of Great Falls*, 278 F.3d at 1343.

Third, Dignity Health contends that our reading would entangle the government in religious matters by requiring it to determine whether religious organizations qualify as churches. But avoidance of this constitutional question would not lead to Dignity Health's construction of the church-plan exemption. To qualify as a church plan under subparagraph (C)(i), a plan must be maintained by a principal-purpose organization that is controlled by or associated with a *church*. And to qualify as an employee of a church under subparagraph (C)(ii)(II), an individual must be an employee of a tax-exempt organization that is controlled by or associated with a *church*. Even on Dignity Health's construction, agencies and courts must distinguish between churches and other religious organizations. *See Kaplan*, 817 F.3d at 531. Thus, Dignity Health's argument again becomes an outright challenge to the church-plan exemption itself.

That challenge fails. Dignity Health suggests that the determination whether an organization qualifies as a church requires a forbidden inquiry into matters of religious doctrine. *See, e.g.*, *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979); *Mitchell v. Helms*, 530 U.S. 793, 826–28 (2000) (plurality opinion); *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987). But such a determination does not require this sort of inquiry, and it is not the inquiry that courts or agencies actually employ. *See Found. for Human Understanding v. United States*, 614 F.3d 1383 (Fed. Cir. 2010); *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304 (D.D.C. 1980).

Finally, Dignity Health contends our reading interferes with internal matters of church governance in violation of both the Establishment and Free Exercise Clauses. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. —, 132 S. Ct. 694, 706–07 (2012). For the reasons already given, there is no Establishment Clause violation. There is also no Free Exercise violation, for even assuming that a church's choice of organizational form is an "internal church decision that affects the faith and mission of the church," the church-plan exemption does not interfere with this choice. *Id.* at 707. Religious groups are free to operate their agencies under the same organizational structure as their churches; they are also free to allow their agencies to operate separately. Under either organizational form, churches may allow their agencies' employees to participate in their pension plans.

F. Additional Issues

In addition to the question the district court certified for interlocutory appeal, Dignity Health urges us to review the district court's rulings that Rollins's lawsuit was timely, that the Plan was not established by a church, and that the Plan is not maintained by a principal-purpose organization. We have discretion to review any issue "fairly included" within the certified order, *Deutsche Bank Nat'l Trust Co. v. FDIC*, 744 F.3d 1124, 1134 (9th Cir. 2014) (internal quotation omitted), but we conclude that interlocutory consideration of these issues is unwarranted.

Conclusion

For the foregoing reasons, we affirm the district court's partial summary judgment and remand for further proceedings.

AFFIRMED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C13-1450 TEH

STARLA ROLLINS,

Plaintiff,

v.

DIGNITY HEALTH, et al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismiss came before the Court on November 4, 2013. Having considered the parties' arguments and the papers submitted, the Court now DENIES Defendants' motion for the reasons set forth below.

BACKGROUND

Defendant Dignity Health ("Dignity")[1] is a non-profit healthcare provider with facilities in sixteen states. Compl. ¶ 1. From 1986 to 2012, Plaintiff Starla Rollins ("Rollins") was employed as a billing coordinator at a Dignity-operated hospital. *Id.* ¶ 18. Based on

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[1] The Defendants' jointly moved to dismiss. Defendants in this case are Dignity Health, Herbert J. Vallier, a former Dignity Health official, and members of Dignity Health's Retirement Plans Sub-Committee. For convenience, the Court refers to the Defendants' collectively as "Dignity."

her employment, Rollins will be eligible for pension benefits from Dignity's benefits plan (the "Plan") when she reaches retirement age. *Id.*

Rollins alleges that Dignity's Plan violates the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. Dignity contends that its Plan need not comply with ERISA because it is a "church plan," which the statute explicitly exempts from its requirements. Rollins maintains that the Plan does not qualify as a church plan as defined by ERISA and in the alternative, if the Plan is exempt, such an exemption violates the Establishment Clause of the First Amendment and is therefore void. *Id.* ¶¶ 162-164.

On behalf of herself and others similarly situated, Rollins seeks declaratory relief that Dignity's Plan is not a church plan exempt from ERISA, as well as injunctive relief requiring Dignity to conform the Plan to ERISA's requirements. She also requests that Dignity make Plan participants whole for any losses they suffered as a result of its ERISA non-compliance and that Dignity pay any other statutory penalties and fees. Dignity moves to dismiss, contending that the Plan is a church plan, exempt from ERISA as a matter of law, and therefore, that Rollins's allegations regarding ERISA violations fail to state a claim for relief.

LEGAL STANDARD

Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6) when a complaint's allegations fail "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In ruling on a motion to dismiss, a court must "accept all material allegations of fact as true and construe the complaint in a light

most favorable to the non-moving party." *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

DISCUSSION

Enacted in 1974, ERISA was designed to ensure that employees actually receive the benefits they are promised by establishing, among other requirements, minimum funding standards and disclosure obligations for employee benefits plans. Pub. L. No. 94-406, 88 Stat. 829 (1974), codified at 29 U.S.C. §§ 1001 *et seq*. ERISA explicitly exempted "church plans" from its requirements and explained "the term 'church plan' means [] a plan established and maintained for its employees by a church or by a convention or association of churches." 29 U.S.C. § 1002(33)(A) (1976). The statute permitted a church plan to also cover employees of church agencies, but the permission was to sunset in 1982. *Id.*

In 1980, ERISA was amended to eliminate the 1982 deadline and to include other clarifications. The relevant statutory section, 29 U.S.C. § 1002(33), now reads as follows:

> (A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of

churches which is exempt from tax under section 501 of title 26.

(B) The term "church plan" does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of title 26), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph—

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

> (ii) The term employee of a church or a convention or association of churches includes—
>
> > (I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;
> >
> > (II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; . . .

29 U.S.C. § 1002(33).

According to Rollins, despite the language in section C (i), which permits church-associated organizations to maintain church plans, section A still demands that only a church may *establish* a church plan. Although Rollins also disputes whether Dignity is a church-associated organization under section C (i), the Court first addresses, and finds dispositive, her argument that Dignity is not a church, and as such cannot establish a church plan, and therefore that Dignity's Plan is not a "church plan" under the statute.

Dignity does not contend that it is a church or that its Plan was started by a church. Rather, relying primarily on section C, it argues that the ERISA statute allows a plan to qualify as a church plan regardless of what entity established the plan, so long as the plan is maintained by a tax-exempt non-profit entity "controlled by or associated with a church or a convention or association of churches." 29 U.S.C. § 1002(33)(C)(i). Because it is a tax-exempt entity

associated with the Roman Catholic Church, and its Plan is maintained by a subcommittee associated with the Roman Catholic Church, Dignity argues that, as a matter of law, its Plan qualifies as a church plan.[2]

Thus, the primary question before the Court is whether the ERISA statute requires a church plan to have been established by a church, or whether the statute merely requires that a church plan be maintained by a tax-exempt organization controlled by or associated with a church.

At the outset, the Court notes that although Dignity argues that "three decades of agency interpretations" – specifically a series of Internal Revenue Service ("IRS") private letter rulings ("PLRs") – support its position that to qualify as a church plan, a plan need only be maintained by a tax-exempt entity associated with a church, the Court declines to defer to the IRS's interpretation of the ERISA statute here.

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[2] To support Dignity's position that both Dignity and its Plan subcommittee are "associated with" the Roman Catholic Church, Dignity submits volumes of documents as an appendix to its motion and as exhibits to two declarations submitted in connection with its papers. "When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond. A court may, however, consider certain materials – [including] matters of judicial notice – without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (citation omitted). However, a court may take judicial notice of documents only for their existence, not the truth of the contents therein. *In re Am. Apparel, Inc. S'holder Litig.*, 855 F. Supp. 2d 1043, 1064 (C.D. Cal. 2012). As Dignity cites to these documents for the truth of the matters asserted within, the Court finds the documents inappropriate for judicial notice and declines to review them here on a motion to dismiss.

The IRS's private letter rulings apply only to the persons or entities who request them and are not entitled to judicial deference.[3] The Court instead conducts its own independent analysis of the statute. 26 C.F.R. § 301.6110-7; 26 U.S.C. § 6110 ("a written determination may not be used or cited as precedent"); *see also Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 978 (7th Cir. 1998) ("Neither the courts nor the IRS may rely on letter rulings as precedent.").

When interpreting a federal statute, a court's goal is to "ascertain[] the intent of Congress" and "giv[e] effect to its legislative will." *In re Ariz. Appetito's Stores, Inc.*, 893 F.2d 216, 219 (9th Cir. 1990). "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183

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[3] Even if entitled to any deference, at best informal, non-precedential decisions, such as the IRS's PLRs, are entitled to only *Skidmore* deference, *see Barrios v. Holder*, 581 F.3d 849, 859 (9th Cir. 2009), such that the weight the Court must give to the letters depends on "the thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The PLRs that Dignity relies on recite Dignity's predecessor organization's structure and repeat portions of the statute. I.R.S. P.L.R. 9409042 (Dec. 8, 1993), 9525061 (Mar. 28, 1995), I.R.S. P.L.R. 9717039 (Jan. 31, 1997), I.R.S. P.L.R. 200023057 (Mar. 20, 2000). The letters do not analyze the statute closely or evaluate how its language applies to Dignity. Because the IRS's letters are conclusory, even under the *Skidmore* framework, they are not entitled to deference. *See Shin v. Holder*, 607 F.3d 1213, 1219 (9th Cir. 2010) (denying deference to Board of Immigration Appeals where its ruling was conclusory and "lack[ed] any meaningful analysis").

(2004) (internal quotation marks omitted). In construing the provisions of a statute, a court should thus "first look to the language of the statute to determine whether it has a plain meaning." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). To the extent a statute is not "plain," a court may look to the traditional canons of statutory interpretation and to the statute's legislative history. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 830–31 (9th Cir. 1996).

The Court's inquiry into whether a plan qualifies as a church plan begins with the text of section A, which, again, states:

> The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) *by a church or by a convention or association of churches* which is exempt from tax under section 501 of Title 26.

29 U.S.C. § 1002(33)(A) (emphasis added). A straightforward reading of this section is that a church plan "means," and therefore by definition, *must be* "a plan established . . . by a church or convention or association of churches."

Complicating the inquiry, however, is section C, which states:

> (i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches *includes a plan maintained by an organization*, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a

> plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, *if such organization is controlled by or associated with a church or a convention or association of churches.*
>
> (ii) The term employee of a church or a convention or association of churches includes—
>
> (I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;
>
> (II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; . . .

29 U.S.C. § 1002(33)(C) (emphasis added). Dignity contends that section C (i) includes within the cate gory of plans "established and maintained . . . by a church" – "a plan maintained by a [church-associated] organization;" therefore, any plan that is maintained by a church-associated organization is a church plan, regardless of whether the plan was established by a church or convention or association of churches. Mot. at 17-18. Although Dignity's proposed reading of the statute is not unreasonable on its face, it violates long-held principles of statutory construction and therefore cannot be the meaning of the statute.

To begin, Dignity's reading violates a "cardinal principle of statutory construction . . . to give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." *Bennett v.*

Spear, 520 U.S. 154, 173 (1997) (internal citations and quotation marks omitted). If, as Dignity argues, all that is required for a plan to qualify as a church plan is that it meet section C's requirement that it be maintained by a church-associated organization, then there would be no purpose for section A, which defines a church plan as one established and maintained by a church. In 1980, Congress amended the church plan exemption portion of the statute to add the language in section C relied upon by Dignity. At the same time, Congress chose to retain the language in section A, that the "[t]he term 'church plan' means a plan established and maintained by a church." To completely ignore the language of section A – language that Congress actively retained – violates the principle to give effect to every clause and word and the related principle "not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1184 (9th Cir. 2013).

Dignity's reading not only renders section A meaningless, but also disregards the limiting language of section C (i), that to maintain a church plan, an organization must not only be associated with the church, but it must have as its "principal purpose or function . . . the administration or funding of a [benefits] plan or program . . . for the employees of a church." Dignity is a healthcare organization; its mission is the provision of healthcare, not the administration of a benefits plan. While its Retirement Plans Sub-Committee's purpose is plan administration, the statute does not say that the organization may have a subcommittee who deals with plan administration. Rather, the statute dictates that organization itself

must have benefits plan administration as its "principal purpose," which Dignity plainly does not.

Furthermore, Dignity's suggested interpretation would reflect a perfect example of an exception swallowing the rule. While the amended section C (i) does permit church plans to *include* plans maintained by some church-associated organizations, for such a specific exception to govern what a church plan *is*, would completely vitiate the original rule embodied in section A, defining a church plan as a plan established and maintained by a church. The Court cannot agree with the notion that Congress could have intended the narrow permission in section C (i) to – by implication – entirely consume the rule it clearly stated in section A.

The canon *expressio unius est exclusio alterius* also militates against Dignity's interpretation of the statute. The canon instructs that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). Based on this canon, we must presume that Congress acted intentionally in using the words "establish and maintain" in section A as something only a church can do, as opposed to the use of only the word "maintain" in section C (i) to refer to the capabilities of church-associated organizations. To assert that any church-associated organization can establish its own church plan fails to appreciate the distinction drawn by Congress through its purposeful word choice.

Moreover, the use of the word "maintain by an organization" in section C (i) mirrors the word

"maintain" in the preceding clause, "a plan established and maintained by a church." This repetition of the word "maintain" without the word "establish" suggests that only the category of "who may maintain a church plan" is being expanded upon in section C (i), not the category of "who may establish a church plan."

At oral argument, Dignity also relied on section C (ii), which allows employees of church-associated organizations to be covered by a church plan, to support its position. Dignity argued that because it is associated with a church and its employees can be covered by a church plan, that its Plan is a church plan. That an established church plan may include employees of a church-associated organization, however, does not mean that an associated organization may *establish* a church plan. Section C (ii) merely explains which employees a church plan may cover – once a valid church plan is established. It does nothing more.

The Court holds that notwithstanding section C, which permits a valid church plan to be maintained by some church-affiliated organizations, section A still requires that a church *establish* a church plan. Because the statute states that a church plan may only be established "by a church or by a convention or association of churches," only a church or a convention or association of churches may establish a church plan. 29 U.S.C. 1002(33)(A). Dignity's effort to expand the scope of the church plan exemption to any organization maintained by a church-associated organization stretches the statutory text beyond its logical ends.

The Court acknowledges that the position it takes here runs contrary to several cases outside this circuit that have considered the church plan exemption and have held that it applies to plans established by

church-affiliated entities. Although those cases are not binding authority, the Court has nevertheless examined each contrary case and is not convinced by the reasoning the cases employed.

Initially, the Court notes that the contrary cases themselves differ in their interpretations of the statutory text. Several cases to have explored the issue appear to have read section C (i)'s language on who may *maintain* a church plan to abrogate the limitations clearly set out in section A on who can *establish* a church plan. *See, e.g.*, *Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1126-27 (D. Minn. 2011); *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547 (4th Cir. 2001). Yet others overlooked the express limitation on section C (i) that an organization maintaining a church plan must have as its "principal purpose or function . . . the administration or funding of a [benefits plan]" and cannot simply be a church-affiliated healthcare organization, or publishing house. *See, e.g*, *Chronister v. Baptist Health*, 442 F.3d 648, 652 (8th Cir. 2006); *Lown*, 238 F. 3d at 547. And still others read into the statute's broad definition of employees who may be covered by a church plan, a completely different idea that church-affiliated organizations may start their own church plans. *See e.g.*, *Rinehart v. Life Ins. Co. of N. Am.*, No. C08-5486 RBL, 2009 WL 995715, at *3 (W.D. Wash. Apr. 14, 2009).

As explained in detail above, the Court is not persuaded by these flawed approaches. Rather, it adheres to the principle that Congress "says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC*, 541 U.S. at 183 (internal quotation marks omitted). If Congress intended to alter the types of entities that can

establish a church plan, such amendment would have been made to section A, which again, clearly states that a church plan is one "established and maintained . . . by a church or by a convention of association of churches." The Court is not compelled by the legal gymnastics required to infer from section C's grant of permission to church associations to maintain a church plan, or its broad view of which employees may be covered by a church plan – that a church plan may be established by any entity other than a church or a convention or association of churches as set forth in section A.

Although the text is conclusive, the Court notes that legislative history also strongly supports its reading. The history explains that the purpose behind section C was only to permit churches to delegate the administration of their benefits plans to specialized church pension boards without losing their church plan status; it was not to broaden the scope of organizations who could *start* a church plan.

Prior to the amendment, because the statute read that a church plan was one "maintained by a church or by a convention or association of churches," churches whose plans were managed by pension boards were concerned about their status. To ensure they could maintain the exemption, leaders of several large church organizations wrote to and testified before Congress about their concerns.[4]

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[4] *See, e.g.*, Letter from Gary S. Nash, Secretary, Church Alliance for Clarification of ERISA, to Hon. Harrison A Williams, Jr., Chairman, Senate Committee on Human Resources (August 11, 1978); Hearing on the ERISA Improvements Act of 1978 Before the S. Comm. on Labor and Human Resources (1978) (statements of Dr. Charles C. Coswert, Executive Secretary, Board of Annuities and Relief of the Presbyterian Church of the

In response to the churches' concerns, Sen. Herman E. Talmadge of Georgia introduced legislation as far back as 1978, with language substantially identical to the language currently in section C (i), to ensure that "a plan funded or administered through a pension board . . . [would] be considered a church plan" so long as the pension board's "principal purpose or function" was the administration of the church plan, and the pension board was "controlled by or associated with a church." 124 Cong. Rec. S8089 (daily ed. June 7, 1978) (statement of Sen. Herman Talmadge). In 1980, H.R. 3904 and S. 1076 were introduced in their respective houses and both sought to make broad changes to ERISA. Sen. Talmadge's church plan concerns were reflected in S. 1090 that year, and eventually came to be a part of S. 1076. H.R. 3904 did not initially include any changes to the church plan exemption, but after H.R. 3904 and S. 1076 both passed their respective houses, the Senate proposed, and the House accepted amendments to H.R. 3904, including Sen. Talmadge's proposed changes to the church plan exemption. Request To Concur In Senate Amendment With Amendments To H.R. 3904, Multi-Employer Pension Plan Amendments Act Of 1980, August 1, 1980.

When seeking to add the language about the church plan exemption reflected in section C into S. 1076, Sen. Talmadge explained to the Senate Finance Committee that the purpose of his proposal was to expand the church plan definition to include "church plans which rather than being maintained directly by a church are

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United States and Gary S. Nash, General Counsel, Annuity Board of the Southern Baptist Convention, Church Alliance for Clarification of ERISA, available as a part of the Appendix to *ERISA Improvements Act of 1978, Hearings before S. Committee on Labor and Human Resources*, 96th Cong. 1317-1394 (1978).

instead maintained by a pension board maintained by a church." Senate Committee on Finance, Executive Session Minutes, June 12, 1980, at 40. In turn, a Press Release documenting the Senate Finance Committee's favorable report on the legislation that same day stated that the Committee had "agreed that the current definition of church plan would be continued . . . . The definition would be clarified to include plans maintained by a pension board maintained by a church." Press Release, United States Senate Committee on Finance (June 12, 1980).

Likewise, once the provision was incorporated into H.R. 3904, the Senate Labor and Human Resources Committee noted on August 15, 1980, that pursuant to the amended bill, the definition of a church plan "would be continued" and only "clarified to include plans maintained by a pension board maintained by a church." Senate Labor and Human Resources Committee Report on H.R. 3904, August 15, 1980. The same position was echoed in the House by Representative Ullman in his comments on August 25, 1980, just weeks before the bill's passage. 126 Cong. Rec. H23049 (daily ed. Aug. 25, 1980). The legislative history thus demonstrates that section C (i) was only intended to permit church pension boards to administer church plans; it was never contemplated to be so broad as to permit any church-affiliated agency to start its own plan and qualify for ERISA exemption as a church plan.

In sum, both the text and the history confirm that a church plan must still be established by a church. Because Dignity is not a church or an association of churches, and does not argue that it is, the Court concludes that Dignity does not have the statutory authority to establish its own church plan, and is not

exempt from ERISA as a matter of law. Defendants' motion to dismiss on this ground is thereby DENIED.

Consequently, the Court refrains from ruling on Rollins's constitutional claim which is premised on a finding that Dignity's plan is exempt from ERISA. For the same reason, the Court also declines to consider Dignity's argument that its exemption from ERISA eliminates the Court's subject matter jurisdiction over this suit. In its reply brief, Dignity also argued that the Court lacks subject matter jurisdiction "because courts may not entangle themselves in a church's affairs." Defs.' Reply at 11. As Dignity failed to raise the argument prior to its reply brief, the Court declines to consider this argument. *See United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers."); *see also Nevada v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990) ("[Parties] cannot raise a new issue for the first time in their reply briefs." (citation omitted)).

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated: 12/12/13

/s/ Thelton E. Henderson
THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed 07/22/14]

Case No. 13-cv-01450-TEH

STARLA ROLLINS,

Plaintiff,

v.

DIGNITY HEALTH, et al.,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court on the parties' cross-motions for partial summary judgment on June 16, 2014. Having considered the parties' arguments and the papers submitted, the Court now GRANTS Plaintiff's motion and DENIES Defendant's motion for the reasons set forth below.

BACKGROUND

This case is about whether Defendant Dignity Health ("Dignity") should conform its benefits plan (the "Plan") to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, or whether the Plan is exempt from ERISA because it is

a "church plan," as defined by the ERISA statute. Dignity previously moved to dismiss this suit, claiming that because it is an entity "controlled by or associated with a church," its Plan is a "church plan" within the definition of the ERISA statute, and is thereby exempt from ERISA's provisions. On December 12, 2013, this Court denied Dignity's motion, holding that under the ERISA statute, a plan must be "established by a church" to be considered a church plan, and Dignity had not argued that it could meet that definition. *Rollins v. Dignity Health*, No. 13-CV-1450 TEH, 2013 WL 6512682, at *7 (N.D. Cal. Dec. 12, 2013).

Dignity moved for interlocutory appeal of that decision and included in a footnote to its reply brief that it was reserving argument that its Plan may have indeed been established by a church, and therefore the Plan may be exempt even under the Court's reading of the statute. Concluding that the dismissal order did not satisfy the requirements set out in 28 U.S.C. § 1292(b), the Court denied the interlocutory appeal motion. *Rollins v. Dignity Health*, No. 13-CV-1450 TEH, 2014 WL 1048637, at *2 (N.D. Cal. Mar. 17, 2014).

In the meantime, Plaintiff Starla Rollins ("Rollins") moved for partial summary judgment seeking declaratory relief that the Plan is not exempt, and injunctive relief directing Dignity to bring its Plan into compliance with ERISA, including its reporting, vesting and funding requirements. Docket No. 91 at 1. Dignity sought additional time to respond to the motion, claiming it needed to retain an expert and engage in more discovery. Docket No. 99. Seeking to proceed more systematically and avoid potentially needless discovery, the Court narrowed the scope of Rollins's

motion to only the question of whether Dignity's Plan is exempt from ERISA (Rollins's declaratory relief claim). Docket No. 105.

Regarding her declaratory relief claim, Rollins argues that there is no genuine dispute of material fact that the Plan was established by Dignity's predecessor, Catholic Healthcare West ("CHW"), that CHW was not a church, and that therefore the Plan is not an exempt church plan under the statute. Dignity opposes Rollins's motion and argues that there is a genuine dispute of material fact because at the time the Plan was established in 1989, CHW was controlled by various religious women's orders known as the "Sponsoring Congregations," which would be considered churches for purposes of the statute. Dignity argues that the Sponsoring Congregations established the Plan jointly with CHW, and alternatively that by way of the Sponsoring Congregations' control over CHW, the Sponsoring Congregations indirectly established the Plan. Therefore, Dignity claims the Plan was "established by a church" for purposes of the ERISA statute and is an exempt church plan. Additionally, Dignity argues that it is entitled to partial summary judgment because Rollins's claim for declaratory relief is barred by the statute of limitations, and because the declaratory relief Rollins seeks would not be "equitable," given that that the Internal Revenue Service ("IRS") has consistently considered the Plan exempt.

LEGAL STANDARD

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Material facts are those that may affect the outcome of the case. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* At the summary judgment stage, the court may not weigh the evidence and must view it in the light most favorable to the nonmoving party. *Id.* at 255.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party must then "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). It is not the duty of the district court "to scour the record in search of a genuine issue of triable fact." *Id.* "[A] mere scintilla of evidence will not be sufficient to defeat a properly supported motion for summary judgment." *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (citation and internal quotation marks omitted).

DISCUSSION

The Court first considers Dignity's arguments in support of partial summary judgment, because if successful, Dignity's arguments would preclude Rollins from obtaining the partial summary judgment she seeks.

A. Dignity's Cross-Motion for Partial Summary Judgment

Dignity argues that Rollins's claim for declaratory relief that Dignity's Plan is not a church plan should be denied because it is not "appropriate equitable

relief" under ERISA § 502(a)(3). ERISA § 502(a)(3) authorizes "a [plan] participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain *other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132 (emphasis added). Dignity contends that because it previously relied on the IRS's rulings that it was exempt, that for the Court to now rule that Dignity's Plan is not in fact exempt would be "inconsistent" and "grossly unfair." Dignity's Mot. at 20.

Therefore, Dignity argues, the declaratory relief Rollins seeks would be "inequitable" and the statute only authorizes relief that is "appropriate" and "equitable." *Id.*

Dignity appears to confuse the meaning of the term equitable insofar as it distinguishes remedies available at law from remedies available in equity, and the meaning of the term as it relates to fairness to Dignity. Declaratory relief is a form of equitable relief. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1039 (9th Cir. 1999). Nothing in the ERISA statute creates an exemption from such relief where the result would be, in one parties' view, "inequitable" or "unfair," and the Court declines to create such an exception for Dignity here. *See Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990) ("Courts should be loath to announce equitable exceptions to legislative requirements . . . that are unqualified by the statutory text.")

To support its position that the Court should not declare its Plan subject to ERISA because that would be "inequitable," Dignity cites to the Restatement of

Trusts (Third) § 95, comment d, as an example where an exception was created to address similar unfairness. The Restatement, however, is unlike the instant case as it involves the power to excuse a trustee from liability where the trustee acted in good faith. Thus, the Restatement deals with liability, it does not suggest that the Court should not declare the legal rights and obligations of the parties, which is the only claim presently at issue here. In Dignity's other cited case, *Moser v. United States*, 341 U.S. 42, 46-47 (1951), the Court permitted a citizenship applicant to persist in his application although he had inadvertently waived his right to apply in reliance on advice by the United States government. The Court in *Moser* simply sought to remedy the government's mistake by offering plaintiff a second chance, it did not perpetuate the government's mistake as Dignity requests the Court do here. Dignity's argument is thus wholly unsupported by the cited caselaw. Furthermore, if adhered to, Dignity's argument would lead to the perverse result where one erroneous IRS determination would have to be infinitely perpetuated for the sake of avoiding so-called "gross[] unfair[ness]." Dignity's Mot at 20. An erroneous IRS ruling, however, should not be permitted to trump a Court's interpretation of a statute, *see Dixon v. United States*, 381 U.S. 69, 74 (1965) (holding that an IRS rule "out of harmony with the statute[] is a mere nullity"), and certainly should not be permitted to persist indefinitely simply by virtue of having come first. That Dignity previously relied on IRS rulings does not render Rollins's declaratory relief claim inappropriate equitable relief under ERISA. Accordingly, Dignity's motion for partial summary judgment on this ground is DENIED.

Dignity also argues that it is entitled to summary judgment because Rollins's declaratory relief claim is barred by the statute of limitations set out in ERISA § 413. Under ERISA § 413, an action for breach of fiduciary responsibility must be commenced within the earlier of: six years from the affirmative act constituting the alleged violation or breach of fiduciary duty, or three years from when plaintiff had actual knowledge of the breach or violation. 29 U.S.C. § 1113. Dignity contends that the affirmative act constituting the breach was when the Plan began operating as a church plan. As that began in 1992, the six-year statute of limitations expired in 1998. Alternatively, Dignity claims that Rollins had actual knowledge that the Plan was claiming exemption when she first received her plan document in 1999, therefore, she had at the latest, until 2002 to file her claims. Rollins filed her suit in 2013. Finally, Dignity also argues that, if the ERISA statute of limitations is not applicable here, then the Court should apply an "analogous" three-year state statute of limitations set out in California Code of Civil Procedure section 338(a), which governs actions "upon liability created by statute, other than a penalty or forfeiture," and begins to run when a plaintiff had actual knowledge of the statutory breach.

Upon reviewing Dignity's statute of limitations arguments, the Court finds them unavailing. The ERISA § 413 statute of limitations does not apply here because that statute applies to claims of breach of fiduciary duty or prohibited transactions. *See* 29 U.S.C. § 1113 (governing "action[s] . . . commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part [titled fiduciary responsibility]"). Those are not the

claims presently at issue here; Rollins seeks declaratory relief that Dignity's Plan is not a church plan. *See Harris Trist & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246 (2000) (explaining that ERISA § 502(a)(1) broadly authorizes plan participants to bring claims to enforce any ERISA provisions, not just claims for breach of fiduciary duty or prohibited transactions).

The state statute of limitations for a "liability created by statute" also does not apply to Rollins's claim. Although it is true that an analogous state statute of limitations may be applied when there is no federal limitations period, "the conclusion that an ERISA cause of action is most analogous to a statutory claim [simply] because ERISA is a statute reflects circular reasoning," and has been resoundingly rejected. *Felton v. Unisource Corp.*, 940 F.2d 503, 512 (9th Cir. 1991). As none of the statutes of limitations Dignity cites are applicable to Rollins's declaratory relief claim, Dignity's claim for partial summary judgment on this ground is DENIED.

B. Rollins's Motion for Partial Summary Judgment

As a threshold matter, Dignity contends that the Court should abstain from ruling on Rollins's motion for partial summary judgment pending a Private Letter Ruling ("PLR") from the IRS on whether Dignity's Plan is an exempt church plan. As the Court has already rejected the statutory interpretation adopted by the IRS in prior PLRs it issued regarding Dignity, and has already held that the PLRs are not entitled to deference, *see Rollins*, No. C13-1450, 2013 WL 6512682, at *3 n.3, there is no reason the Court should refrain from ruling on this matter that is otherwise ripe for decision.

Based on the Court's previous ruling that under the ERISA statute, only a church may establish a church plan, Rollins argues that because CHW established the Plan at issue here, and CHW was not a church, Rollins is entitled to a declaration that the Plan is not a church plan exempt from ERISA. Dignity does not dispute that CHW itself was not a church. *See* Partial Summary Judgment Hr'g Tr. 16, June 16, 2014, Docket No. 170 ("Your Honor, we certainly do not contend that CHW itself is a church."). But rather, Dignity maintains there is a genuine dispute over whether CHW established the Plan, or whether several religious women's orders, known as the "Sponsoring Congregations," did.

ERISA itself does not define the term "establish" and neither the Ninth Circuit nor the Supreme Court have ruled on how exactly an ERISA plan is established. Generally, the term establish can mean both "to enact permanently" as well as to "to make or form; to bring about or into existence." Black's Law Dictionary (9th ed. 2009).

To support her position that CHW established the Plan, Rollins cites to several internal CHW documents submitted by Dignity with respect to these cross-motions, that demonstrate – and in some instances even state – that CHW established the Plan. For example, a December 19, 1988 resolution by the CHW Board of Directors states that "the [CHW] Corporation approves, authorizes and directs" the adopting of the "Catholic Healthcare West Retirement Plan" effective January 1, 1989. *See* Mary Connick Declaration ("Connick Decl."), Ex. A at 8092[1]. In 1992, CHW's

[1] Bates indicator "DIGNITY" and any preceding zeros are omitted.

Board of Directors decided to retroactively operate the Plan as an exempt church plan, and in the resolution implementing the change, the Board referred to the Plan as follows: "Catholic Healthcare West ("CHW") *established* the Catholic Healthcare West Retirement Plan ("Plan") effective January 1, 1989, as a retirement vehicle for employees within the CHW system." Connick Decl., Ex. B at 8093 (emphasis added). A copy of a CHW document constituting a 1990 amendment and complete restatement of the original "Plan Document" describes the Plan as having been "made and entered into by the Plan Sponsor, Catholic Healthcare West." Samuel Hoffman Declaration ("Hoffman Decl."), Ex A at 8418. Also, in requests submitted by CHW to the IRS seeking a determination on CHW's church plan status in 1993, CHW stated that it had established the Plan. *See* Hoffman Decl., Ex. A at 6799 ("CHW established and maintains a defined benefit pension plan."). Rollins also offers Dignity's Answer which refers to the very Plan at issue here as one of the "plans *established* by Dignity Health" which was formerly known as CHW. Answer ¶ 3 (emphasis added), Docket No. 86.

Notwithstanding Rollins's evidence that CHW's Board of Directors resolved to establish the Plan, and that Dignity's own documents describe CHW as having established the Plan, Dignity argues that a genuine dispute of material fact remains because at the time CHW established the Plan, CHW was controlled by several religious orders, or "Sponsoring

Congregations," which would be considered churches for ERISA purposes.[2]

Dignity argues that *vis a vis* their control over CHW, the Sponsoring Congregations' actually established the Plan. Alternatively, Dignity argues that the Sponsoring Congregations – jointly with CHW – established the Plan.

With respect to Dignity's first argument, Dignity fails to raise a dispute sufficient to defeat summary judgment because whether or not the Sponsoring Congregations controlled CHW is immaterial because CHW was a separate corporation at the time it established the Plan. In 1988, when the CHW Board of Directors voted to adopt the Plan, CHW was a separately incorporated non-profit public benefit corporation organized under California law. *See* Bernita McTernan Declaration ("McTernan Decl.") ¶ 4; *see also* 1988 CHW Board of Directors Resolution, Connick Decl., Ex. A at 8092 (stating that "the

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[2] Although the ERISA statute does not itself define a church, the Treasury Regulations implementing the statute define a church as follows:

> For the purpose of this section the term "church" includes a religious order or a religious organization if such order or organization (1) is an integral part of a church, and (2) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise.

Treas. Reg. § 1.414(e)-1(e). Dignity does not argue that CHW satisfies this definition, only that the Sponsoring Congregations meet this definition. Rollins disputes that the Sponsoring Congregations are churches. Because, even assuming that the Sponsoring Congregations are churches for purposes of ERISA, Dignity fails to raise a genuine dispute of material fact, the Court declines to rule on whether the Sponsoring Congregations are churches.

Corporation approves, authorizes and directs" the adopting of the "Catholic Healthcare West Retirement Plan"). Under California law, a corporation's conduct is attributed to that corporation; the corporate form is reluctantly disregarded, and only where a claim is made that the corporate form is being abused, which is not the case here. *See Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 300 (1985). Thus, even if the Sponsoring Congregations exhibited some control over CHW, that alone is insufficient to set aside CHW's separate identity, to "pierce its corporate veil," and impute CHW's conduct to the Sponsoring Congregations. *See Communist Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 993-94, 41 Cal. Rptr. 2d 618, 625-26 (1995) ("Persons who themselves control a corporation, who have used the corporate form of doing business for their benefit, who have dealt with and treated the corporation as a separate entity . . . may be estopped to deny the corporation's separate legal existence.").

At the hearing, the Court asked Dignity's Counsel: What authority is there for piercing the corporate veil of Catholic Healthcare West, and imputing the establishment of its benefits plan to the Sponsoring Congregations? Counsel responded that "the alter ego doctrine does not apply" here and that Dignity is "not asking the Court whatsoever to pierce the corporate veil," but is merely arguing that the Sponsoring Congregations set up CHW, controlled CHW, and were "responsible for CHW." Hr'g Tr. 24-25, Docket No. 170. Although Dignity maintains that it is not explicitly arguing for veil piercing, the Court can only interpret Dignity's argument as a request to do so because imputing the actions of CHW – a separate corporation – to the Sponsoring Congregations could only be done if CHW's veil was pierced. "Generally, the corporate veil can be pierced only by an adversary of

the corporation, not by the corporation itself for its own benefit." *See Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir. 1996) "The purpose of forming a corporation is to establish a separate legal entity. [Because CHW] enjoys the advantages of separate incorporation under the civil law, . . . it must bear the disadvantages." *See De La Salle Inst. v. United States*, 195 F. Supp. 891, 901 (N.D. Cal. 1961) (internal citations omitted); *see also Disenos Artisticos E Industriales, S.A.*, 97 F.3d at 380. ("[A] corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties."). As Dignity fails to offer any legal authority or facts to justify veil-piercing, its mere allegation that the Sponsoring Congregations controlled CHW does not raise a genuine dispute of material fact as to whether CHW – a separate corporation – established the Plan.[3]

Additionally, even if the Sponsoring Congregations' control over CHW was of legal significance, Dignity fails to put forth any evidence that the Sponsoring Congregations actually exercised total control over CHW, or even more limitedly, over the Plan's formation. Dignity's evidence shows that CHW had a Corporate Member Board, which was comprised of one representative from each Sponsoring Congregation.

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[3] Moreover, allowing a church-controlled entity to establish a church plan by imputing the establishment to its controlling church would contradict the reasoning reflected in this Court's previous order: Congress drew a distinction in ERISA when it specifically referred to churches as having the ability to establish church plans, and church-controlled entities as only having the ability to maintain church plans, once established. *See Rollins*, 2013 WL 6512682 at *5. If control by a church was sufficient to make an entity a church, that distinction would be meaningless.

See Connick Decl., Ex. A at 8092. On certain limited matters, the Corporate Member Board had final approval, for example, adopting a mission, creating a new corporation, or selling substantial assets, *id.* at 8197-8201, however, the Corporate Member Board did not have approval rights over the establishment of the Plan. *See id.* at 8175 ("subject to the reservation of rights [to the Corporate Member Board as enumerated] . . ., the activities and affairs of this corporation shall be conducted and all corporate powers shall be exercised by or under the direction of its *board of directors*") (emphasis added). In fact, the 1988 resolution establishing the Plan was passed by CHW's Board of Directors, not its Corporate Member Board, and the Sponsoring Congregations had only some representation – but not majority representation – on CHW's Board of Directors. McTernan Decl., Ex A at 8172, 8175-6 (CHW Restated Bylaws July 1, 1988). Based on this evidence regarding the Corporate Member Board and the Board of Directors, there is no indication that the Sponsoring Congregations had any decision-making authority over CHW, much less the degree of control Dignity argues existed. Conclusory assertions that the Corporate Board "Members controlled CHW," McTernan Decl. ¶ 4, do not create a genuine dispute. *See FTC v. Publ'g Clearing House,* 104 F.3d 1168, 1171 (9th Cir. 1996) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.") (*citing Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993)); *see also F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) ("A non-movant's bald assertions . . . are . . . insufficient to

withstand summary judgment.")[4] Thus, even if the matter of control were dispositive – and it is not – there is simply no evidence to raise a genuine issue of material fact that CHW was under the Sponsoring Congregations' control, or that even the function of pension plan establishment was under the Sponsoring Congregations' control.

Dignity's second argument against summary judgment is that the Sponsoring Congregations "co-established the Plan" jointly with CHW. Hr'g Tr. 20, Docket No. 170. In support of the argument, Dignity offers a 1990 Amendment and Restatement of the Plan Document which describes the CHW Plan as the plan that "resulted from the merger . . . of [] seven prior plans." Hoffman Decl., Ex. A at 8418. Because two of the seven prior plans were those of two Sponsoring Congregations, the Sisters of Mercy, Auburn, and the Sisters of Mercy, Burlingame, Dignity argues that the Sponsoring Congregations established the Plan. The document, however, does not support that contention. That in 1990, the Plan Document was amended to describe that a merger occurred, does not suggest that at the time the Plan was established, that the Sponsoring Congregations also established the Plan. Significantly, Dignity also submits several documents relating to that merger. The documents demonstrate

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[4] Although Dignity submitted volumes of records, much of it bears no relationship to the Sponsoring Congregations' involvement in CHW at the time of the Plan's establishment in 1989. *See* McTernan Decl., Exs. B-C (CHW Organizational Charts from 1995 and 1999, respectively), Ex. L (Dignity Health's Charter, approved 03/23/2012); Connick Decl., Exs. B-E (Documents from 1992 explaining 1992 decision to treat CHW Plan as a church plan); McGuiness Decl., ¶ V. A-C (providing expert opinion explaining role of women religious orders in the Catholic Church generally, not their specific involvement in CHW in 1989).

that after the Plan came into effect, several Sponsoring Congregations resolved to merge their plans into the CHW Plan. *See, e.g.*, Connick Decl., Ex. A, at 8091 (Resolution of Board of Directors of Sisters of Mercy, Burlingame dated January 10, 1989 after the CHW Plan's January 1, 1989 effective date, stating "Catholic Healthcare West has adopted a retirement plan known as the Catholic Healthcare West Retirement Plan . . . it is in the best interest of the [Sponsoring Congregation] . . . to merge [our] Plan into the CHW Plan . . ."). These documents, therefore, show only that some Sponsoring Congregations decided to merge their plans into the already-established CHW Plan; they do not raise genuine dispute as to the actual establishment of the Plan.

Finally, Dignity offers a resolution passed by several hospitals and hospital organizations, including the Sisters of Mercy Burlingame and Auburn organizations, agreeing to be affiliated with the Plan and to make contributions to the Plan. Hoffman Decl., Ex A at 8488. That resolution, however, was passed December 30, 1988, after the CHW Board had already resolved to establish the Plan on December 19, 1988. *Id.* In fact the resolution acknowledges that fact in its statement "*Catholic Healthcare West* has caused this Plan Agreement to be executed *by its respective duly authorized officers. Further,* by the joint execution of . . . [CHW] and the below indicated Companies, such Companies [including the so-called Sponsoring Congregations] are designated as Affiliates . . . and . . . adopt this Plan Agreement." *Id.*(emphasis added). Thus, after acknowledging that CHW formed the Plan, the resolution merely notes that additional organizations also adopt the Plan. At best, Dignity's evidence demonstrates that once CHW established the Plan, several Sponsoring Congregations' plans merged

into it, and several Sponsoring Congregations signed on as affiliates. This evidence, however, does not generate a genuine factual dispute as to who "enacted" the Plan or brought about its existence.

Looking at the totality of the evidence and viewing it in the light most favorable to Dignity, Dignity fails to raise a genuine issue of material fact as to whether CHW established the Plan in question. Although the Sponsoring Congregations may have been involved in CHW's management, and may have joined on to the CHW Plan, Dignity fails to put forth any evidence to rebut the position – as demonstrated by the December 19, 1988 resolution by the CHW Board of Directors – that CHW established the CHW Plan.

To the extent Dignity attempts to re-litigate the Court's interpretation of the ERISA statute by arguing that under its preferred interpretation of the statute, a Plan established by CHW would be exempt, and alleging that the Court's interpretation results in excessive governmental entanglement with religion – the law of the case is controlling. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). As the Court sees no reason to depart from its earlier ruling, it holds once more, that pursuant to the ERISA statute, mere association with a church does not give an entity the authority to establish a church plan. *See Rollins*, No. C13-1450, 2013 WL 6512682, at *5.

In sum, under the Court's reading of the statute, a church plan may only be established by a church. There is no genuine dispute of material fact that CHW established the Plan here, and that CHW is not a church. Accordingly, Rollins is entitled to summary judgment on her claim for declaratory relief that the plan established by CHW – the Dignity Plan at issue

here – is not a church plan as defined by ERISA, and is therefore not exempt from ERISA.

CONCLUSION

For the reasons discussed above, Defendant's motion for partial summary judgment is DENIED, and Plaintiff's motion for partial summary judgment on her declaratory relief claim is GRANTED.

IT IS SO ORDERED.

Dated: 7/22/14

/s/ Thelton E. Henderson
THELTON E. HENDERSON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed 11/26/14]

Case No. 13-cv-01450-TEH

STARLA ROLLINS,

Plaintiff,

v.

DIGNITY HEALTH, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO CERTIFY COURT'S ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR INTERLOCUTORY APPEAL AND STAYING CASE

On July 22, 2014, the Court granted partial summary judgment for Plaintiff because the Court had previously concluded that ERISA's "church plan" exception only applied if a retirement plan was established by a church, and there was no genuine dispute as to the facts that Catholic Healthcare West was not a church and had established the plan at issue in this case. Defendants subsequently filed this motion to certify the Court's Order for interlocutory appeal and stay the case. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter suitable for resolution

without oral argument. For the reasons given below, the Court now GRANTS Defendants' motion, CERTIFIES its July 22, 2014 Order for interlocutory appeal, and STAYS all further proceedings pending the Ninth Circuit's decision whether or not to hear the appeal.

BACKGROUND

Plaintiff Starla Rollins ("Rollins") was employed as a billing coordinator by Defendant Dignity Health ("Dignity") from 1986 to 2012. Rollins challenges Dignity's practice of operating its employees' retirement savings plan ("the Plan") as a "church plan," exempt from the funding and disclosure requirements of the Employee Retirement Income Security Act ("ERISA"). Dignity has at all times argued that the Plan meets ERISA's definition of a church plan, as set out at 29 U.S.C. § 1002(33).

In December of 2013, the Court denied Dignity's motion to dismiss this action, holding that under ERISA's plain meaning, a plan must be "established by a church" to be considered a church plan, and Dignity had not argued that it could meet that definition. *Rollins v. Dignity Health*, No. 13-cv-1450 TEH, 2013 WL 6512682, at *7 (N.D. Cal. Dec. 12, 2013). Dignity moved to certify that decision for interlocutory appeal, which the Court denied in March of 2014, because it did not satisfy the requirements set out at 28 U.S.C. § 1292(b). *Rollins v. Dignity Health*, No. 13-cv-1450 TEH, 2014 WL 1048637, at *2 (N.D. Cal. Mar. 17, 2014).

In July of 2014, the Court granted Plaintiff's and denied Defendants' cross-motions for partial summary judgment. *Rollins v. Dignity Health*, No. 13-cv-1450 TEH, 2014 WL 3613096, at *1 (N.D. Cal. July 22, 2014). The Court reiterated its prior holding that a

church plan must be established by a church. *Id.* at *6. The Court found that there was no genuine dispute as to the material facts that Defendants' predecessor, Catholic Healthcare West ("CHW"), established the Plan, and that CHW was not a church. *Id.* Accordingly, the Court held that the Plan was not an exempt church plan, and therefore was subject to ERISA's requirements. *Id.*

On October 27, 2014, Plaintiff brought motions for a permanent injunction and to certify a class. (Docket Nos. 180, 183). At a Case Management Conference held November 3, the Court stayed Plaintiff's motions and provided Defendants the opportunity to seek an appeal of the Court's prior order. (Docket No. 191). On November 10, 2014, Defendants brought this motion to certify the Court's July 22, 2014 Order for interlocutory appeal. (Docket No. 197).

LEGAL STANDARD

A party may bring an interlocutory appeal of a district court's order where the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and [] an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). "[T]his section [is] to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.3d 1020, 1026 (9th Cir. 1982).

DISCUSSION

I. There is a Controlling Question of Law at Issue

Defendants seek to certify for appeal the question whether an ERISA church plan must be established by

a church, or rather whether it is sufficient for a plan to have been established by an organization controlled by or associated with a church. "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.3d at 1026.

The parties do not dispute that the question to be certified is a controlling question of law in this case. Based on its prior answer to the question, the Court entered partial summary judgment for Plaintiff on the issue of whether the Plan was subject to ERISA's requirements. *Rollins*, 2014 WL 3613096, at *6. Plaintiff has used the Court's Order as the basis for motions for a permanent injunction and for class certification, charting the litigation's current trajectory.

On the other hand, if the Court of Appeals were to reverse this Court's determination, the litigation would take a decidedly different path. First, unless the Court of Appeals also answers this subsequent question, the Court would need to determine whether Dignity or its predecessor was "associated with" or "controlled by" a church while it maintained the Plan. 29 U.S.C. § 1002(33)(C)(i). The Court may again find that the Plan is not a church plan, but if the Court finds that it is, it will need to inquire as to whether there is Article III standing for it to continue to hear the case, as Plaintiff's standing may depend on ERISA's application to the Plan. And, if the Court were to find that Plaintiff has standing, it would need to turn to Plaintiff's Establishment Clause challenge to the church plan exception itself. Each of these

possible alternative trajectories would only be available if the Court of Appeals reverses this Court's interpretation of the statute.

The Court previously found that this question was not a "controlling question of law," because Defendants had not demonstrated what made this an "exceptional situation" justifying interlocutory appeal. *Rollins*, 2014 WL 1048637, at *2. Defendants have persuaded the Court that a different determination is now appropriate. The remaining issues to be decided in this case, and the attendant costs of discovery, will vary significantly depending on the resolution of this issue. As noted above, there are several different questions, many of them dispositive, that will need to be answered if the Court of Appeals reverses this Court's determination. Discovery for the question of whether Dignity was associated with or controlled by a church will almost certainly be different than class certification discovery, which will be different than discovery for Plaintiff's breach of fiduciary duty claims. Dignity estimates having to spend several thousand additional attorney hours, costing in excess of $500,000, to respond to the currently pending and expected discovery requests, in addition to incurring several hundred thousand dollars in attorneys' fees in responding to Plaintiff's currently pending motions. Rochman Decl. at 2 (Docket No. 198). These costs could be avoided, perhaps entirely, by a reversal at the Court of Appeals.

For these reasons, the Court now finds that this case presents an exceptional situation, such that appellate resolution of this question may avoid expensive and protracted litigation and could materially affect the outcome of the case.

II. There are Substantial Grounds for Disagreement on this Question

The Court also finds that there are substantial grounds for disagreement here. One of the best indications that there are substantial grounds for disagreement on a question of law is that other courts have, in fact, disagreed. *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010); *see also Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) ("[W]hen novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal . . . ."); *AsIs Internet Servs. v. Active Response Grp.*, No. 07-cv-06211-TEH, 2008 WL 4279695, at *3 (N.D. Cal. Sept. 16, 2008) (substantial ground for difference of opinion existed where there was an "intra-district split" on a novel legal issue).

Here, two district courts have decided this issue explicitly in conflict with this Court's decision. In *Overall v. Ascension Health*, No. 13-cv-11396, 2014 WL 2448492 (E.D. Mich. May 19, 2014), the court noted that this Court had "interpreted section (A) as a gatekeeper of section (C). That is, [it] concluded that section (A) sets the standard—only a church can establish a church plan—and section (C) only describes how a plan under section (A) can be maintained." 2014 WL 2248492, at *10. However, "under the rules of grammar and logic, A is not a 'gatekeeper' to C; rather if A is exempt and A includes C, then C is also exempt." *Id.* (internal quotation marks and citation omitted). The court went on to conclude that the plans in that case were church plans, exempt from ERISA. *Id.* at *15.

Similarly, in *Medina v. Catholic Health Initiatives*, No. 13-cv-01249-REB-KLM, 2014 WL 4244012 (D. Colo. Aug. 26, 2014), the court rejected this Court's

interpretation and that of the magistrate judge in that case. The court found that "the plain language clearly supports the conclusion that a plan that meets the requirements of subsection (C)(i) putatively qualifies for the exemption—without further, separate proof of establishment by a church—if the remaining requirements of the statute are otherwise met." 2014 WL 4244012, at *2. "By reiterating the same 'established and maintained' language of subsection (A), subsection (C) affirms that 'established' and 'maintained' are not two distinct elements, but rather a singular requirement, a term of art, as used in the statute." *Id.* The court was presented with, and rejected, this Court's interpretation, evidencing substantial grounds for disagreement on this issue.

Moreover, before this Court's Order, two district courts in the Ninth Circuit endorsed a contrary interpretation. In *Rinehart v. Life Ins. Co. of N. Am.*, No. 08-cv-5486-RBL, 2009 WL 995715 (W.D. Wash. Apr. 14, 2009), the court reasoned that "The term 'church plan' is somewhat misleading because even a plan established by a corporation controlled by or associated with a church can also qualify as a church plan." 2009 WL 995715, at *2. The court found that the plan at issue was a church plan because it was maintained by an organization controlled by and associated with a church, without discussing whether the plan was also "established" by a church. *Id.* at *5. And in *Okerman v. Life Ins. Co. of N. Am.*, No. 00-cv-0186-GEB/PAN, 2001 WL 36203082 (E.D. Cal. Dec. 24, 2001), the court found that a plan was a church plan because it was "maintained" by an organization that met the requirements of 29 U.S.C. § 1002(33)(C)(i), without requiring the plan to have been "established" by a church. *See* 2001 WL 36203082, at *3-4.

Only one court has agreed with this Court's interpretation. In *Kaplan v. Saint Peter's Healthcare Sys.*, No. 13-cv-2941, 2014 WL 1284854 (D.N.J. March 31, 2014), the court held that "subsection A is the gatekeeper to the church plan exemption: although the church plan definition, as defined in subsection A, is expanded by subsection C to include plans *maintained* by a tax-exempt organization, it nevertheless requires that the plan be *established* by a church . . . ." 2014 WL 1284854, at *5 (emphasis in original). The court noted that "The *Rollins* court's interpretation of the church plan definition is in accord with this Court's decision." *Id.* at *8.

Given the level of disagreement that has become apparent since this Court's July 22 Order, and considering the previous cases within the Ninth Circuit to have applied a different rule, the Court finds that there are substantial grounds for disagreement with its interpretation. The second § 1292(b) factor is therefore satisfied.

III. Resolution of This Issue Will Materially Advance the Litigation

Finally, the Court finds that an interlocutory appeal will materially advance the termination of the litigation. "[N]either § 1292(b)'s literal text nor controlling precedent requires that the interlocutory appeal have a final, dispositive effect on the litigation, only that it 'may materially advance' the litigation." *Reese*, 643 F.3d at 688. Given the standard for a "controlling question of law" articulated by the court in *In re Cement Antitrust Litig.*, the considerations of this factor overlap significantly with the first one. As already noted, appellate resolution of this issue will clearly impact the course of further motions and discovery. Importantly, if the Court were to deny

certification now and continue with Plaintiff's motions but subsequently be reversed by the Ninth Circuit, the Court would then need to consider the remaining issues of statutory interpretation, standing, and constitutionality that much later, after significant expense will have been incurred.

Although Plaintiff does not dispute that the question presented is controlling, she argues that its interlocutory appeal will not materially advance the litigation, because many issues will remain to be decided. However, as noted above, the Court would need to turn to such issues eventually if the Ninth Circuit reversed this Court's determination at a later date. By addressing this question now, the Court saves time and expense. If the Ninth Circuit reverses, the parties can turn to these issues sooner rather than later. And if the Court of Appeals affirms, the case can proceed on the relatively few issues that remain with greater certainty. Such certainty could even encourage a negotiated settlement, which would not just materially but completely advance the termination of this litigation. *See Securities and Exchange Commission v. Mercury Interactive*, LLC, No. 07-cv-02822-JF, 2011 WL 1335733, at *3 (N.D. Cal. Apr. 7, 2011) ("A final resolution as the scope of the statute would have a significant effect on the trial of this action, and perhaps upon the parties' efforts to reach settlement.").

IV. The Case Should be Stayed Pending the Ninth Circuit's Decision

The Court also concludes that proceedings in this case should be stayed until the Ninth Circuit decides whether or not to hear this appeal. A district court may stay a case pending interlocutory appeal. 28 U.S.C. § 1292(b). "A district court has inherent power to control the disposition of the causes on its docket in

a manner which will promote economy of time and effort for itself, for counsel, and for litigants." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). When considering whether to stay proceedings, courts should consider "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.* (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936).

Here, Plaintiff has identified two potential sources of damage from granting a stay; first, that she and her putative class will lack ERISA's protections for their retirement benefits, and second, that it will be burdensome to restart discovery later, where it is almost completed now.

The Court finds the first reason unconvincing, because Plaintiff has not shown that the Plan is currently at risk of being underfunded; to the contrary, Defendants have put forward evidence suggesting that the Plan is adequately funded for the next decade. Connick Decl. at 1 (Docket No. 199). Furthermore, the absence of ERISA's reporting and disclosure requirements is not itself a great enough injury to prevent a stay here.

Plaintiff's second reason is also unconvincing. As already noted, Defendants are incurring significant costs in their efforts to produce discoverable materials. Depending on the resolution of this appeal and any subsequent issues, this discovery may be unnecessary. Plaintiffs will not be injured by freezing discovery now; they will merely have to wait until a later date, when it is clearer that such discovery is needed. The mere

fact that Defendants may be "close" to finishing a particular round of discovery does not suggest that it is inequitable to stop discovery now; given the number of attorney hours Defendants are spending to comply with this request, completing production for this round will certainly be costly. While the Court recognizes that there is a potential loss of efficiency in stopping a discovery effort that may be restarted later, this potential inefficiency is warranted here, where the ongoing discovery is so costly and may be rendered unnecessary altogether.

Finally, for the reasons discussed in parts I and II, above, the Court finds that the orderly course of justice will be served by staying the proceedings now. Appellate resolution will provide certainty on the certified legal issue sooner rather than later. Such certainty will allow the litigation to turn to the remaining issues in an orderly fashion. Imposing a stay promotes orderly litigation by preventing the parties from arguing and the Court from deciding issues that may be rendered moot by the Ninth Circuit's decision.

CONCLUSION

For the reasons set forth above, Defendants' motion to certify the Court's July 22, 2014 Order for interlocutory appeal is GRANTED. The Case Management Conference scheduled for January 5, 2015 is continued to February 9, 2015 at 1:30 PM; the parties shall update the Court on the status of certification in a joint statement no later than 7 days prior to the Case Management Conference. All other proceedings in this case are STAYED pending the Court of Appeals' decision whether or not to take the appeal. The hearing scheduled for December 1, 2014 is VACATED.

IT IS SO ORDERED.

Dated: 11/26/14

/s/ Thelton E. Henderson
THELTON E. HENDERSON
United States District Judge

APPENDIX E

1. The First Amendment to the United States Constitution provides in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

2. 29 U.S.C. §1002(33) provides:

(33)(A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26.

(B) The term "church plan" does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of title 26), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph—

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose

or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes—

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of title 26 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of title 26 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section

501 of title 26 and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan—

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of title 26) at the time of such separation from service.

(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means—

(I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

3. 26 U.S.C. § 414(e) provides:

(e) Church plan

(1) In general

For purposes of this part, the term "church plan" means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501.

(2) Certain plans excluded

The term "church plan" does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of

churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513); or

(B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries).

(3) Definitions and other provisions

For purposes of this subsection—

(A) Treatment as church plan

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(B) Employee defined

The term employee of a church or a convention or association of churches shall include—

(i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 and which is controlled by or associated with a church or a convention or association of churches; and

(iii) an individual described in subparagraph (E).

(C) Church treated as employer

A church or a convention or association of churches which is exempt from tax under section 501 shall be deemed the employer of any individual included as an employee under subparagraph (B).

(D) Association with church

An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(E) Special rule in case of separation from plan

If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization described in clause (ii) of paragraph (3)(B), the church plan shall not fail to meet the requirements of this subsection merely because the plan—

(i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section

72(m)(7)) at the time of such separation from service.

(4) Correction of failure to meet church plan requirements

(A) In general

If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 fails to meet one or more of the requirements of this subsection and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this subsection for the year in which the correction was made and for all prior years.

(B) Failure to correct

If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this subsection beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(C) Correction period defined

The term "correction period" means—

(i) the period, ending 270 days after the date of mailing by the Secretary of a notice of default with respect to the plan's failure to meet one or more of the requirements of this subsection;

(ii) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary on the basis of

all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(iii) any additional period which the Secretary determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.